

# DON'T BLAME US: HOW OUR ATTRIBUTIONAL PROCLIVITIES INFLUENCE THE RELATIONSHIP BETWEEN AMERICANS, BUSINESS AND GOVERNMENT

ADAM BENFORADO \*

"Many people want the government to protect the consumer. A much more urgent problem is to protect the consumer from the government."

~ Milton Friedman<sup>1</sup>

"I don't give a good goddamn *what* Milton Friedman says."

~ Richard Nixon<sup>2</sup>

## I. INTRODUCTION

People seem at no loss for words when it comes to metaphors for the government. Overbearing father.<sup>3</sup> Noble steed.<sup>4</sup> Nightwatchman.<sup>5</sup> Parasite.<sup>6</sup> Pig.<sup>7</sup> Alimentary canal.<sup>8</sup> Hive of bees.<sup>9</sup>

---

\* Assistant Professor of Law, Drexel University Earle Mack School of Law. I would like to extend my gratitude to Jeffrey Stanton for helpful research assistance.

<sup>1</sup> See Michael Franc, *Durbin Wrong Again in Pushing Big Government for Medicare Expenses*, HERITAGE FOUND., Apr. 21, 2007, <http://www.heritage.org/Research/Commentary/2007/04/Durbin-Wrong-Again-in-Pushing-Big-Government-for-Medicare-Expenses> (quoting Milton Friedman).

<sup>2</sup> See Peter Robinson, *A Capital Thinker: Milton Friedman's Ideas About Free Markets Changed Minds, Economies and Nations*, STANFORD MAG., Jan.-Feb. 2007, available at <http://www.stanfordalumni.org/news/magazine/2007/janfeb/dept/friedman.html> (quoting Richard Nixon). As discussed later, Nixon established the U.S. Consumer Products Safety Commission in 1972. See *infra* note 34 and accompanying text.

<sup>3</sup> See, e.g., Thomas B. Macaulay, *Southey's Colloquies on Society*, 50 EDINBURGH REV. 528, 553 (1830) ("Nothing is so galling and detestable to a people not broken in from the birth, as a paternal, or, in other words, a meddling government,—a government which tells them what to read, and say, and eat, and drink, and wear.").

<sup>4</sup> E.g., PLATO, THE APOLOGY OF SOCRATES, DIALOGUES OF PLATO: CONTAINING THE APOLOGY OF SOCRATES, CRITO, PHAEDO, AND PROTAGORAS 11, 25 (Benjamin Jowett trans., Colonial Press 1900) ("[T]he [s]tate is like a great and noble steed who is tardy in his motions owing to his very size, and requires to be stirred into life.").

<sup>5</sup> ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 26, 162 (Basic Books 1974).

Many of the metaphors are flexible enough that they can be cast in multiple lights. Robert Shiller, the Yale economist, has suggested that “[t]he government is like a referee in a sports match: The players argue with him, but they don’t want him to leave the game.”<sup>10</sup> Rich Karlgaard at *Forbes* magazine, by contrast, has asserted that “[t]he government is like a referee who says he wants a good game but also wants to jigger the rulebook and manage the outcome.”<sup>11</sup>

In such analogical debates, with the focus on exposing the true essence of governance or regulation, it can be all too easy to treat the subject as fixed and settled. But, in fact, the relationship between business, government and the people is changeable and contingent. The nature of interactions is constantly being redefined as the complex adaptive system morphs and modulates.<sup>12</sup>

Certain psychological tendencies, existing power dynamics and structures may serve as constraints on the evolution of the system, but there is much that is variable, and even these constraints may change form in the unfolding interplay of the regulated and the regulating.

---

<sup>6</sup> E.g., Ron Paul, *Government Stimulus, One Year Later*, TEXAS STRAIGHT TALK (Feb. 22, 2010, 10:01 AM), [http://www.house.gov/htbin/blog\\_inc?BLOG,tx14\\_paul,blog,999,All,Item%20not%20found,ID=100222\\_3649,TEMPLATE=postingdetail.shtml](http://www.house.gov/htbin/blog_inc?BLOG,tx14_paul,blog,999,All,Item%20not%20found,ID=100222_3649,TEMPLATE=postingdetail.shtml) (“The more the burden, the closer the government parasite comes to killing its host.”).

<sup>7</sup> E.g., CITIZENS AGAINST GOVERNMENT WASTE, *THE PIG BOOK: HOW GOVERNMENT WASTES YOUR MONEY* 121 (Thomas Dunne Books 2010) (2005).

<sup>8</sup> E.g., BILL ADLER, *THE REAGAN WIT* 30 (Bill Adler & Bill Adler Jr. eds., Caroline House Publishers 1981) (“Government is like a baby—an alimentary canal with a big appetite at one end and no sense of responsibility at the other.” (quoting Ronald Reagan)).

<sup>9</sup> E.g., Plato, *reprinted in* THE FORBES BOOK OF BUSINESS QUOTATIONS 155 (Ted Goodman ed., 90 anniversary ed. 2007) (“Democracy does not contain any force which will check the constant tendency to put more and more on the public payroll. The state is like a hive of bees in which the drones display, multiply and starve the workers so the idlers will consume the food and the workers will perish.”).

<sup>10</sup> Pat Wechsler & Peter Robison, *Obama Aid Signals Deal With “Devil” as Bankers Get New Rules*, BLOOMBERG PRESS, June 8, 2009, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a0yXeqHPvAIs&refer=news> (quoting Robert Shiller).

<sup>11</sup> Rich Karlgaard, *The Great Recession Did Not Have to Be Great* FORBES DIGITAL RULES BLOG (Mar. 3, 2010, 1:50 PM), <http://blogs.forbes.com/digitalrules/2010/03/great-recession-did-not-have-to-be-great/>.

<sup>12</sup> See, e.g., J. B. Ruhl, *Law’s Complexity: A Primer*, 24 GA. ST. U. L. REV. 885, 889–96 (2008) (offering a brief overview of complex adaptive systems theory).

### A. *The Blame Game*

The purpose of this Article is to offer some insight into one of the critical elements that defines the dynamic relationship between government, business and the people: how we apportion blame when there are negative outcomes that might implicate corporate entities.<sup>13</sup>

Consider the major crises of the last couple of years: a severe recession leads to millions losing their homes to foreclosure; an epic oil spill poisons the Gulf of Mexico; an obesity epidemic threatens the health of American children.

Who or what engendered the shanty town that appeared in Sacramento, California in 2008?<sup>14</sup> Who blackened the pelican and closed the beach of Pensacola?<sup>15</sup> What lies behind the rise in diabetes in elementary school students?<sup>16</sup>

The answers that we give drive our remedial responses and our prophylactic measures—and in doing so, define the interactions between our regulatory institutions, business entities and members of the public.

If you believe that business causes—or, at least, significantly contributes to—a lot of these types of harms in society, then you are likely to want a government that gets tough and restrains corporations to protect the public. If you think that business is largely blameless, then you are likely to be in favor of free markets with little or no regulation.

Much is riding on our attributional proclivities. And quite conveniently, social psychologists and other mind scientists have devoted significant resources to understanding our basic tendencies with respect to assigning causation and responsibility.

This Article begins by delving into some of that psychological research that suggests that Americans—and Westerners more generally—tend to make particular types of attributions for human actions and outcomes.<sup>17</sup>

---

<sup>13</sup> Given their size, wealth, and influence, corporations are the primary focus of this Article, although the analysis that follows is also relevant to certain other business organizations.

<sup>14</sup> Maria L. La Ganga, *In Sacramento's Tent City, a Torn Economic Fabric*, L.A. TIMES, Mar. 20, 2009, <http://articles.latimes.com/2009/mar/20/local/me-tent-city20>.

<sup>15</sup> Melissa Nelson, *Pensacola Beach Closed After Oil Washed Ashore*, BUS. WK., June 24, 2010, <http://www.businessweek.com/ap/financialnews/D9GHSS4O3.htm>.

<sup>16</sup> *Children and Diabetes—More Information*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/diabetes/projects/cda2.htm> (last updated Mar. 12, 2010).

<sup>17</sup> The Article adopts a critical realist (or law and mind sciences) approach, which relies on the insights of social psychology, social cognition, cognitive neuroscience

The Article then addresses how the proclivity to assign causal responsibility to personal disposition-related factors, rather than generally-more-influential situational factors, is incredibly valuable to business because it allows corporate entities to (1) control our environments to encourage profitable consumer behavior and (2) evade government intervention. This leads into a discussion of how corporations and their allies work to bolster our natural inclinations in order to maintain an advantageous relationship between regulators, corporations and members of the public. The Article focuses specifically on how businesses play on our basic attributional framework when negative events occur that might implicate them. Finally, the Article suggests that if we want to make meaningful policy changes to avoid bad outcomes, we need to attend to what the evidence from the mind sciences tells us about why people and organizations act the way that they do.

*B. Case Study: The Creation of the Bureau of Consumer Financial Protection*

To provide some real world context to the discussion, the Article gives special attention to the consumer financial products industry and the drive, in the wake of the recent economic debacle, to create a new regulator for industry companies.

In July 2010, President Barack Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act, which created the Consumer Financial Protection Bureau (CFPB).<sup>18</sup> The agency, which was allocated an annual budget of almost a half-billion dollars and housed under

---

and related fields to construct a more realistic model of human behavior upon which to base law and legal theory. For other representative work in the project, see Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. 1333 (2010); Adam Benforado & Jon Hanson, *Naïve Cynicism: Maintaining False Perceptions in Policy Debates*, 57 EMORY L.J. 499 (2008); Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1 (2004); Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003).

<sup>18</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010). There has been a shift to referring to the bureau as the CFPB rather than the BCFP. See, e.g., Ron Lieber, *What the Justice Department's Credit Card Suit Means for You*, N.Y. TIMES BUCKS BLOG (Oct. 5, 2010, 1:37 AM), <http://bucks.blogs.nytimes.com/2010/10/05/what-the-justice-department-credit-card-suit-means-for-you/?hp>. Also, in most publications, the tendency has been to not capitalize "the bureau" or "the agency." See, e.g., Ron Lieber, *Some Suggestions for the New Consumer Chief*, N.Y. TIMES, Sept. 18, 2010, at B1.

the Federal Reserve Board,<sup>19</sup> will have the ability to “implement and, where applicable, enforce federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent and competitive.”<sup>20</sup>

Although the creation of the bureau can arguably be traced back to a 2007 proposal by Elizabeth Warren,<sup>21</sup> the real impetus was the worst financial crisis since the 1930s.<sup>22</sup> Part of the motivation for formulating a new agency had to do with political strategy: the White House felt it needed a populist measure aimed at middle-class Americans to balance out anger and frustration that the government seemed to be focusing only on helping Wall Street through the bailouts.<sup>23</sup> But the more significant part of the bureau’s emergence had to do with the actual causes of the recession: lending practices were deeply implicated in the events leading up to the credit crisis. As Princeton University economist and former vice chairman of the Federal Reserve Board Alan Blinder put it, “[O]ne major contributor to the subprime mess was that unwary consumers were duped into mortgage products they should never have touched.”<sup>24</sup> The story of nefarious lending practices during the housing boom, however, must be contextualized in a larger narrative concerning a more general increase in consumer financial products and consumer debt load over a number of years. Even prior to the signing of the bank-friendly Bankruptcy Abuse Prevention and Consumer Protection Act, credit card lending had been growing rapidly, and after its enactment the trend only accelerated as “[b]anks thought there was new safety in lending to dubious credit risks because those borrowers could not use the bankruptcy laws to renege if they

---

<sup>19</sup> Damian Paletta, *Fight Over Consumer Agency Looms as Overhaul Is Signed*, WALL ST. J., July 22, 2010, at A1 (The CFPB budget requires no approval from Congress).

<sup>20</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 § 1021.

<sup>21</sup> Elizabeth Warren, *Unsafe at Any Rate*, 5 DEMOCRACY 8, 16 (2007) (making an argument for a Financial Product Safety Commission); see also Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 2 (2008) (“[U]rging the creation of a new federal regulator that will have both the authority and the incentives to police the safety of consumer credit products.”).

<sup>22</sup> Paletta, *supra* note 19.

<sup>23</sup> Cf. Sheryl Gay Stolberg & Peter Baker, *Obama’s Measures for Middle Class*, N.Y. TIMES, Jan. 25, 2010, <http://www.nytimes.com/2010/01/26/us/politics/26obama.html>.

<sup>24</sup> Alan S. Blinder, Editorial, *It’s Time for Financial Reform Plan C*, WALL ST. J., Mar. 11, 2010, <http://online.wsj.com/article/SB10001424052748704140104575057370607736284.html>.

went broke.”<sup>25</sup> The result was an untenable situation with high profits for industry built upon an extremely shaky foundation.

In the months after President Obama first proposed the idea of a Consumer Financial Protection Agency (CFPA) in June 2009,<sup>26</sup> a significant battle emerged not only over the shape of the agency, but also whether it would even exist. In the words of the *Wall Street Journal*, the bureau “barely survived,”<sup>27</sup> as stakeholders clashed over insulating various institutions and financial products. Community bank associations, for example, ended up being quite successful in restricting the authority of the agency to enforce against them—those with assets under \$10 billion were completely exempt from compliance inspections by the new regulators.<sup>28</sup> Auto dealers and real estate brokers achieved similar results, winning blanket carve-outs.<sup>29</sup> In addition, there were attempts to meaningfully cutback on the independence of the bureau, with business interests keen on placing the organization in a setting where it could be controlled and where its aim of protecting consumers would be subordinated to other charges (in the Fed, for example, “after monetary policy, financial stability, and safety-and-soundness regulation”).<sup>30</sup>

The battle is far from over. In the coming years, the bureau will be tasked with developing two dozen rules covering large banks and mortgage lenders, payday-loan businesses and student-loan companies,<sup>31</sup> as well as

---

<sup>25</sup> Floyd Norris, *Perfect for the Job She Created*, N.Y. TIMES DEALBOOK BLOG (July 23, 2010, 12:43 AM), <http://dealbook.blogs.nytimes.com/2010/07/23/norris-perfect-for-a-job-she-created/>.

<sup>26</sup> Paletta, *supra* note 19. Since the name of the entity changed between the time it was proposed and when it was finally established, this Article primarily uses the identifying terms “bureau,” “agency” or “CFPB” and only employs “CFPA” when mentioning specific references to the early formulation of the agency.

<sup>27</sup> *Id.*

<sup>28</sup> Alan S. Blinder, Editorial, *The Two Issues to Watch on Financial Reform*, WALL ST. J., Apr. 22, 2010, at A23. Small banks still have to follow the rules that the bureau sets. See Paletta, *supra* note 19.

<sup>29</sup> Michael Crittenden, *Rep. Frank Gives Up on Increasing Auto Dealers’ Oversight*, WALL ST. J. WASH. WIRE BLOG (June 24, 2010, 4:39 PM), <http://blogs.wsj.com/washwire/2010/06/24/rep-frank-gives-up-on-increasing-auto-dealers-oversight/?KEYWORDS=%22consumer+financial+protection%22>.

<sup>30</sup> Blinder, *supra* note 28.

<sup>31</sup> Editorial, *The Uncertainty Principle*, WALL ST. J., July 14, 2010, at A18 (“The new rules will run into the hundreds if not thousands of pages in the Federal Register.”); see also Eric Lichtblau, *Ex-Regulators Get Set to Lobby on New Financial Rules*, N.Y. TIMES, July 28, 2010, at B1. The rules and policies formulated by the bureau can only be overturned by other regulatory bodies if they “would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk.” Dodd-Frank Wall

ensuring compliance with old laws that were poorly enforced by existing banking regulatory agencies.<sup>32</sup> The result will be real changes for consumers, impacting things from the debit fees they are charged to the mortgages they enter into.<sup>33</sup>

As investigated in this Article, the ongoing challenges to the agency—including efforts to cut back the scope of its authority—have much to do with our attributional tendencies and with the role of business interests in encouraging the public to view the causes of the economic harms of the last two years in a certain way. Understanding our psychological proclivities with respect to assigning blame and allocating responsibility can greatly help in explaining the reaction against the bureau and the reason that the agency's ultimate manifestation was not more robust. Moreover, the fight over the bureau's creation is representative of those occurring in the broader financial crisis and can serve as a case study in how the relationship between government, business and the American public is ultimately determined.

It is a story that has played out numerous times in the past. Indeed, there are striking similarities between the battle over the bureau and attacks on the entity it was largely modeled after: the U.S. Consumer Product Safety Commission (CPSC), an independent agency founded in 1972 during the Nixon administration, and “charged with protecting the public from unreasonable risks of serious injury or death from thousands of types of consumer products.”<sup>34</sup> Although the CPSC has overseen a “30 percent decline in the rate of deaths and injuries associated with consumer products over the past 30 years,”<sup>35</sup> saving billions of dollars in associated costs annually,<sup>36</sup> the very idea of such an agency produced a strong backlash

---

Street Reform and Consumer Protection Act of 2010 § 1023, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>32</sup> Floyd Norris, *She's a Candidate for a Job She Devised*, N.Y. TIMES, July 23, 2010, at B1.

<sup>33</sup> Paletta, *supra* note 19.

<sup>34</sup> U.S. CONSUMER PROD. SAFETY COMM'N, *About CPSC*, <http://www.cpsc.gov/about/about.html> (last visited Sept. 12, 2010); *see also* Warren, *Unsafe at Any Rate*, *supra* note 21, at 17. In creating the CPSC, Congress acknowledged that “the complexities of consumer products and the diverse nature and abilities of consumers using them frequently result in an inability of users to anticipate risks and to safeguard themselves adequately.” 15 U.S.C. § 2051 (2006).

<sup>35</sup> U.S. CONSUMER PROD. SAFETY COMM'N, *supra* note 34.

<sup>36</sup> *Id.*

from the likes of Milton Friedman and many others,<sup>37</sup> and remains controversial to this day.<sup>38</sup>

The usefulness of investigating our basic attributional tendencies is that it facilitates a much richer understanding of our experiences with regulatory innovations in both the past and present, and may allow us to avoid costly mistakes as we move into the future.

## II. ATTRIBUTIONS OF CAUSATION AND RESPONSIBILITY

Over a period of several decades, psychologists have conducted numerous experiments that show that people in Western countries, including the United States, tend to operate with a naïve psychological model that explains human behavior as primarily shaped by dispositional forces rather than elements in our situations.<sup>39</sup> According to the model, individuals are rational, autonomous, self-transparent actors who make free choices that reflect their unique stable preferences, beliefs and attitudes; and since outcomes can be controlled, it follows that people ought to be

---

<sup>37</sup> See *supra* note 34 and accompanying text.

<sup>38</sup> As *Washington Examiner* columnist Melanie Scarborough wrote in 2007, “In case you missed it, in 1972, the federal government declared you an idiot.” Melanie Scarborough, *Where Were You in '72?*, WASH. EXAMINER, Aug. 23, 2007, available at [http://www.washingtonexaminer.com/opinion/columns/melanie\\_scarborough\\_where\\_were\\_you\\_in\\_722007-08-23T07\\_00\\_00.html](http://www.washingtonexaminer.com/opinion/columns/melanie_scarborough_where_were_you_in_722007-08-23T07_00_00.html). Scarborough went on to characterize the CPSC as a costly, “political,” “overwrought” bureaucracy, “manufacturing crises where none exists” and “protect[ing] primarily its own bloated interests” at the expense of business profits. *Id.* According to Scarborough, people who are unable “to anticipate risks” only get what they deserve when they are injured by consumer products. *Id.* As she noted, “Social Darwinism would perhaps argue against heroic efforts” to prevent child deaths from swallowing magnets from broken toys that later “attach internally, pinching the intestines.” *Id.*

<sup>39</sup> See, e.g., LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION* 125–33 (Temple University Press, 1st ed. 1991); ZIVA KUNDA, *SOCIAL COGNITION: MAKING SENSE OF PEOPLE* 428–32 (1999); Daniel T. Gilbert & Patrick S. Malone, *The Correspondence Bias*, 117 PSYCHOL. BULL. 21 (1995). There is some evidence that non-Westerners do not have the same attributional tendencies as Westerners. See, e.g., RICHARD E. NISBETT, *THE GEOGRAPHY OF THOUGHT: HOW ASIANS AND WESTERNERS THINK DIFFERENTLY . . . AND WHY* (2003); Michelle Gabler et al., *Latin American, Asian, and American Cultural Differences in Perceptions of Spousal Abuse*, 83 PSYCHOL. REP. 587 (1998); Hazel Rose Markus & Shinobu Kitayama, *Culture and the Self: Implications for Cognition, Emotion, and Motivation*, 98 PSYCHOL. REV. 224 (1991); Michael W. Morris & Kaiping Peng, *Culture and Cause: American and Chinese Attributions for Social and Physical Events*, 67 J. PERSONALITY & SOC. PSYCHOL. 949, 964 (1994).



held accountable for their actions, good or bad.<sup>40</sup> While this attributional proclivity can be quite affirming, useful in conserving cognitive resources and a fairly effective predictor of behavior over time *when the situation remains constant*,<sup>41</sup> it tends to miss a considerable amount of what moves us.<sup>42</sup>

Part of that largely invisible situation lies in our interiors. Many of our thoughts and behaviors are driven by unconscious and automatic mental processes.<sup>43</sup> We carry implicit biases that drive our actions even as we believe that we are unbiased.<sup>44</sup> We often take action and then rationalize our behavior, rather than reasoning our way to a particular decision.<sup>45</sup> We

---

<sup>40</sup> See Alan Page Fiske et al., *The Cultural Matrix of Social Psychology*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 915, 920 (Daniel T. Gilbert et al. eds., Oxford Univ. Press, 4th ed. 1998).

<sup>41</sup> See, e.g., KUNDA, *supra* note 39, at 417–18.

<sup>42</sup> See Lee Ross & Donna Shestowsky, *Contemporary Psychology's Challenges to Legal Theory and Practice*, 97 NW. U. L. REV. 1081, 1092–93 (Spring 2003).

<sup>43</sup> See, e.g., John A. Bargh & Ezequiel Morsella, *Unconscious Behavioral Guidance Systems*, in THEN A MIRACLE OCCURS: FOCUSING ON BEHAVIOR IN SOCIAL PSYCHOLOGICAL THEORY AND RESEARCH (Christopher R. Agnew et al., eds., 2009).

[T]hese are exciting times because science is beginning to unravel the basic nuts and bolts of human action, the majority of which are unconscious. People are generally unaware of the sources of their behavioral impulses and of how their actions are successfully guided to completion; it is difficult indeed then to understand how conscious awareness can effectively guide action without massive support by unconscious guidance systems.

*Id.*; see also Jonathan Haidt, *The Emotional Dog and its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 819 (2001) (“The emerging view in social cognition is that most of our behaviors and judgments are in fact made automatically.”).

<sup>44</sup> See, e.g., Adam Benforado, *Quick on the Draw: Implicit Bias and the Second Amendment*, 89 OR. L. REV. (forthcoming 2010) (providing an overview of recent research on implicit racial bias and its connection to behavior).

<sup>45</sup> In the words of John A. Bargh and Ezequiel Morsella, “action precedes reflection.” John A. Bargh & Ezequiel Morsella, *The Unconscious Mind*, 3 PERSP. PSYCHOL. SCI. 73, 73 (2008); see also Chun Siong Soon et al., *Unconscious Determinants of Free Decisions in the Human Brain*, 11 NATURE NEUROSCIENCE 543, 543 (2008) (“[T]he outcome of a decision can be encoded in brain activity of prefrontal and parietal cortex up to 10 seconds before it enters awareness”); Daniel M. Wegner, *The Mind's Best Trick: How We Experience Conscious Will*, 7 TRENDS COGNITIVE SCI. 65, 68 (2003) (“The experience of conscious will is a marvelous trick of the mind, one that yields useful intuitions about our authorship—but it is not the foundation for an explanatory system that stands outside the paths of deterministic causation.”).

remain tethered to rigid categories, scripts and schemas, even as we believe ourselves to be “free” thinkers.<sup>46</sup>

The other part of that largely invisible situation involves exterior elements—forces, structures and other factors in our environments. Thus, as Lee Ross and Donna Shestowsky have summarized, “[L]aypeople are prone to overestimate the degree of stability likely to be manifest in a given individual’s behavior over time and across different contexts, and to underestimate the extent to which changes in the particular circumstances or environment confronting that individual might produce significant changes in his or her behavior.”<sup>47</sup> In Stanley Milgram’s famous experiments, as a result of powerful but unappreciated situational pressures, people from all walks of life were subtly influenced into delivering what they believed were potentially debilitating electrical shocks to a stranger—indeed, sixty-three percent of the diverse sample continued to give shocks all the way up to the last setting, 450 volts, despite hearing the stranger scream in apparent pain, complain of a heart condition, demand that the experiment stop, and eventually go silent.<sup>48</sup> Thus, seemingly irrelevant frames and primes can radically alter our cognition and our actions—and do so in predictable ways.<sup>49</sup> In the Milgram study, simply explaining that the experiments were being conducted by Research Associates of Bridgeport rather than Yale University notably decreased the number of people willing to deliver the full 450 volts of electricity.<sup>50</sup> And much of the work in psychology over the last four decades—in the form of thousands of experiments—has yielded similarly staggering results showing that the most minor of environmental manipulations can make a major difference. Reminding Asian-American female math majors of their race before a math test resulted in significantly better performance than reminding them of their gender.<sup>51</sup> Participants given a warm cup of coffee to hold briefly on

---

<sup>46</sup> See Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103 (2004) (providing an overview of relevant research).

<sup>47</sup> See Ross & Shestowsky, *supra* note 42.

<sup>48</sup> PHILIP G. ZOMBARDO & MICHAEL R. LEIPPE, *THE PSYCHOLOGY OF ATTITUDE CHANGE AND SOCIAL INFLUENCE* 68 (1991).

<sup>49</sup> Although “individual behavior is not consistent across situations . . . individual responses to specific situations are surprisingly consistent across persons.” Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383, 1394–95 (2003).

<sup>50</sup> STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (Harper & Row 1974); ZOMBARDO & LEIPPE, *supra* note 48, at 65–74.

<sup>51</sup> See Margaret Shih et al., *Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance*, 10 PSYCHOL. SCI. 80, 80 (1999) (“Common cultural stereotypes hold that Asians have superior quantitative skills compared with other ethnic groups and that women have inferior quantitative skills compared with men.”).

an elevator were found to subsequently assess another person as being more interpersonally warm and to engage in more pro-social behavior than those who held a glass of ice water.<sup>52</sup> Likewise, participants asked to fill out a survey while using a heavy clipboard estimated currencies to be more valuable and rated an issue as more serious and important than those using a light clipboard.<sup>53</sup> Even single words can change perception and cognition. In one experiment, individuals who had just watched a film of a car accident estimated that the cars were moving nine miles per hour faster when they were asked to estimate the speed at which the cars “smashed” together, as opposed to “contacted”—and they were also significantly more likely to report the presence of shattered glass when later asked to recall what they had seen, although no shards appeared in the actual film.<sup>54</sup>

While all of these situational elements matter, we disregard them and focus our attention on the personality and choices of the salient actors in the relevant scene, and that is true even when the situational frames are readily apparent. In a famous demonstration of the robustness of our dispositionism, experimenters randomly assigned participants to roles as questioners and contestants participating in a fake game show.<sup>55</sup> Observers were explicitly told that questioners had fifteen minutes to construct their own general-knowledge trivia questions that would then be posed to the contestants. Yet, after the contestants (unsurprisingly) missed many of the questions, the observers nonetheless judged the questioners as having far higher general knowledge than the contestants—indeed, questioners received ratings that were an incredible seventy percent higher than contestants.<sup>56</sup> In other words, observers completely ignored what they had been told about the situation and focused entirely on the dispositions of the participants in trying to make sense of the outcome. It was the peculiar setup of the quiz—with the questioners, permitted to select trivia from their existing knowledge base, at a great advantage over the contestants—that provided the best explanation for the results, but the potency of

---

<sup>52</sup> See Adam Benforado, *The Body of the Mind: Embodied Cognition, Law, and Justice*, 54 ST. LOUIS U. L.J. (forthcoming 2010) (summarizing this research and many other similar studies in the field of embodied cognition); Lawrence E. Williams & John A. Bargh, *Experiencing Physical Warmth Promotes Interpersonal Warmth*, 322 SCI. 606, 606–07 (2008).

<sup>53</sup> See Nils B. Jostmann et al., *Weight as an Embodiment of Importance*, 20 PSYCHOL. SCI. 1169 (2009).

<sup>54</sup> See Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. VERBAL LEARNING & VERBAL BEHAV. 585 (1974).

<sup>55</sup> See Lee D. Ross, Teresa M. Amabile & Julia L. Steinmetz, *Social Roles, Social Control, and Biases in Social-Perception Processes*, 35 J. PERSONALITY & SOC. PSYCHOL. 485 (1977).

<sup>56</sup> See KUNDA, *supra* note 39, at 430.

dispositionism meant that the explicit instructions disappeared in the mind's eye.<sup>57</sup> Observers' naïve psychological narrative dictated that since humans are rational, autonomous actors mastering their environment, rather than being mastered by it, the contestants' (poor) choices on the quiz reflected their (poor) intelligence.

As the preceding paragraphs have suggested, our dispositionism is not set in stone: it is a strong general tendency that is ultimately contingent on various situational factors.<sup>58</sup> For instance, we are far more likely to forsake situational explanations for actions when we are addressing the negative behavior of others—particularly outgroup members, than when we are making sense of our own failures and bad outcomes, or those of our fellow ingroup members.<sup>59</sup> As Justin D. Levinson and Kaiping Peng explain, “According to the ultimate attribution error, perceivers grant members of their own group the benefit of the doubt when making attributions (e.g., she donated because she has a good heart). Yet when they explain the acts performed by members of out-groups, perceivers often assume the worst, using stereotypes to help them make attributions (e.g., he donated to gain favor).”<sup>60</sup> Moreover, “group threats often increase our tendency to

---

<sup>57</sup> In another similar example, experimenters instructed participants to make judgments as to the true opinions of the authors of essays either defending or attacking Fidel Castro. See Edward E. Jones & Victor A. Harris, *The Attribution of Attitudes*, 3 J. EXPERIMENTAL SOC. PSYCHOL. 1 (1967). Just like the participants in the game show experiment, those assessing the essayists ignored the impact of powerful situational factors, which they had been fully informed about, on behavior: thus, even when told that the authors had been assigned to their positions (and were given no choice at all over whether to write in support of Fidel Castro or against him), participants nonetheless demonstrated a tendency to assess authors writing in defense of Castro as being pro-Castro. *Id.* at 6.

<sup>58</sup> See Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior are Shaping Legal Policy*, 57 EMORY L.J. 311, 328–38 (2008) (analyzing how various exterior situations can permit certain individuals to break away from dispositionism).

<sup>59</sup> See ROSS & NISBETT, *supra* note 39, at 140–41 (providing an overview of studies). As experiments have shown, we are far more likely to offer dispositionist attributions when we achieve positive outcomes. See Tom Pyszczynski & Jeff Greenberg, *Toward an Integration of Cognitive and Motivational Perspectives on Social Interference: A Biased Hypothesis-Testing Model*, 20 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 297, 298 (1987).

<sup>60</sup> Justin D. Levinson & Kaiping Peng, *Different Torts for Different Cohorts: A Cultural Psychological Critique of Tort Law's Actual Cause and Foreseeability Inquiries*, 13 S. CAL. INTERDISC. L.J. 195, 218–19 (2004); see also ROSS & NISBETT, *supra* note 39, at 140–41 (1991) (reviewing research suggesting that dispositionism is tempered when individuals make attributions about their own failures).

dispositionalize.”<sup>61</sup> In a well-known set of experiments from the 1950s, young boys were divided randomly into two groups at a summer camp, which resulted in mild ingroup favoritism, but little outgroup disparagement.<sup>62</sup> However, when the experimenters introduced the threat of competition between the groups, pitting the two sides against each other in a battle over various prizes, each side suddenly engaged in strong dispositional attributions about the members of the other group.<sup>63</sup>

Likewise, the extent of the harm inflicted may, itself, influence our causal attributions. In the words of Craig Haney, “[A]ll other things being equal, the greater the harm that the particular behavior brings about, the more likely that it will be attributed to internal causes (i.e., to the perpetrator of the act).”<sup>64</sup>

Of course, sometimes, even with bad outcomes, the causal role of the situation is so salient that we cannot disregard it, even when an outgroup member is involved and even when the harm is significant. But most of the time, we are strongly resistant to the notion that grievous harms can arise from the chance interaction of elements in our situations as opposed to human malfeasance.<sup>65</sup> Scientists believe that part of this may be explained by our overriding motivation to believe that the world is just and that our systems are legitimate and fair.<sup>66</sup> Our inclination to suppose that people get what is coming to them<sup>67</sup> can even result in us blaming the victim when bad things happen.<sup>68</sup> As various experiments have shown, the notion that

---

<sup>61</sup> Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1724 (2004).

<sup>62</sup> MUZAFAER SHERIF ET AL., INTERGROUP CONFLICT AND COOPERATION: THE ROBBERS CAVE EXPERIMENT 74–95 (1961).

<sup>63</sup> *Id.* at 96–115.

<sup>64</sup> Craig Haney, *Exoneration and Wrongful Condemnations: Expanding the Zone of Perceived Injustice in Death Penalty Cases*, 37 GOLDEN GATE U. L. REV. 131, 162–63 (2006) (citing Chimaeze Ugwuogbu & Clyde Hendrick, *Personal Causality and Attribution of Responsibility*, 2 SOC. BEHAV. & PERSONALITY 76 (1974)).

<sup>65</sup> See Dripps, *supra* note 49, at 1399–1400, 1407–08.

<sup>66</sup> See Benforado et al., *supra* note 61, at 1645, 1664–68 (reviewing experiments conducted by Melvin Lerner, John Jost and others).

<sup>67</sup> See Melvin J. Lerner & Dale T. Miller, *Just World Research and the Attribution Process*, 85 PSYCHOL. BULL. 1030, 1030 (1978).

<sup>68</sup> See Cathaleene Jones & Elliot Aronson, *Attribution of Fault to a Rape Victim as a Function of Respectability of the Victim*, 26 J. PERSONALITY & SOC. PSYCHOL. 415, 416–17 (1973). In one well known experiment, participants were shown a video of an experiment like Milgram’s in which a woman was being shocked for giving incorrect answers. See Melvin J. Lerner & Carolyn H. Simmons, *Observer’s Reaction to the “Innocent Victim,”* 4 J. PERSONALITY & SOC. PSYCHOL. 203 (1966). Half of participants were permitted to reassign the woman to a new, non-painful study, while the other half were not. The result was that the subjects

innocent, well-intentioned people can have terrible things happen to them is extremely threatening to our belief that the world is just, and to avoid this dissonance we often look for corrupted dispositions and fault in the actions of those who suffer bad outcomes.<sup>69</sup> In addition, when we feel the system is under meaningful threat, our tendency to dispositionalize events and outcomes is heightened—in fact, it can lead those in poor circumstances to engage in self-scapegoating (that is, to explain their lots as arising from their own poor dispositions and choices).<sup>70</sup>

### III. THE VALUE OF DISPOSITIONISM FOR BUSINESS

If members of the public are inclined to over-attribute behavior and resulting outcomes to dispositional factors and ignore the frequently more potent influence of situational constraints and forces, it is still not clear how this tendency might be valuable to American business or how it might ultimately influence the relationship between corporate entities and the American government. In the pages that follow, the Article explains that the benefits for business arise from the ways in which our dispositionism (1) prevents us from appreciating the significant manipulation of our environments by corporations to achieve profitable consumer behavior and (2) interferes with our ability to see corporations as blameworthy entities deserving of regulation and liability when negative outcomes occur.

#### A. *Manipulating Consumer Choices*

In my Business Organizations course, I like to ask students if they think that advertising matters much and whether we ought to regulate it more rigorously. Students tend to be pretty uniform in providing a strong no on both questions. They are willing to grant that perhaps very young children might be swayed by what they see on television, but for most Americans advertisements really just provide information about products—they do not change people's preferences.<sup>71</sup> Students are particularly adamant when I ask if they themselves are influenced by advertising: absolutely not! That makes sense, after all: they are discerning second- and third-year law students. They are educated, experienced and savvy—they have been

---

who could do nothing later rated the woman far more negatively than those who could reassign her. As Lerner and Dale Miller explained, "[T]he sight of an innocent person suffering without the possibility of reward or compensation motivated people to devalue the attractiveness of the victim in order to bring about a more appropriate fit between her fate and her character." *Id.* at 205.

<sup>69</sup> See Lerner & Miller, *supra* note 67, at 1035.

<sup>70</sup> For a summary of this research, see John T. Jost & Orsolya Hunyady, *The Psychology of System Justification and the Palliative Function of Ideology*, 13 EUR. REV. SOC. PSYCHOL. 111, 126–27 (2002).

<sup>71</sup> This is, of course, the story to which corporations adhere.

trained to see through manipulation. But then why do corporations spend billions of dollars on product placements, marketing campaigns and advertising? In a single year, one company, Procter & Gamble Co., spent \$4.9 billion on advertising alone—with \$809 million going to cable television, \$967 million going to network television and \$839 million going to magazines.<sup>72</sup> That seems like a lot of money to be spending if it does not have much of an effect on the public, outside of the preschool set. Confronted with these questions, students struggle—“well, maybe companies waste all that money because they just don’t know it’s not working,” “perhaps if you have a new product it can help you get your name out there,” “it probably has to do with letting the public know about why you’re better than your competitors so they can make a better decision.” These are possibilities, I concede, but if it is about getting useful information about your products to consumers, why are many of the biggest marketing and advertising campaigns brought on behalf of brands that have been around for decades, like Coca-Cola and Budweiser? And what new information do we really learn about Bud Light by watching a commercial featuring a man whose house made of beer cans is trashed by his thirsty friends? At this point, a few students smile, but what they do not do is backtrack much on whether they are being manipulated by corporate marketing and advertising.<sup>73</sup>

This robust confidence that we are not subject to interior biases or exterior influence is one of the greatest benefits for businesses looking to increase their profits exponentially. Consumers believe that they are fully in control of their choices and environments, but as corporations know well—and as the psychological evidence outlined in this Article documents—our wants and desires are largely up for grabs. Housewives in downtown Manhattan can be convinced to buy Hummers. Millions of Americans can be trained to fork over cash for bottled water, when the stuff out of the tap is free and more carefully regulated for impurities. Changing people’s situations means changing their behavior. To maximize sales, you do not have to make the product to cater to the consumer; you can make the consumer to cater to the product.

In other work, my co-authors and I chronicled how fast food companies dominate our situations by using an array of different strategies.<sup>74</sup> They employ firms like International Flavor & Fragrance to create chemical

---

<sup>72</sup> *Biggest Advertisers*, CNBC, <http://www.cnbc.com/id/24186387/?photo=1> (last visited Sep. 18, 2010).

<sup>73</sup> See JEAN KILBOURNE, *CAN’T BUY MY LOVE: HOW ADVERTISING CHANGES THE WAY WE THINK AND FEEL* 27 (2000) (discussing the fact that despite the prevalence and power of advertising, most people believe that advertising does not affect them).

<sup>74</sup> See Benforado et al., *supra* note 61, at 1693–1711.

concoctions to make milkshakes taste like they have real strawberries in them, although they do not, and make burgers taste as though they have been on a grill, although they have only ever seen the inside of a microwave.<sup>75</sup> They offer supersizing, knowing that most of their costs are fixed no matter what the size of the portion, but that consumers will jump at an apparent bargain.<sup>76</sup> And they are especially vigorous in targeting the most vulnerable of all: children. Fast food companies formulate product tie-ins with kid's movies and place advertisements on Saturday morning cartoons,<sup>77</sup> as well as signing exclusive deals with thousands of cash-strapped schools to sell to a captive audience.<sup>78</sup>

Although the product is completely different, this section argues that credit card and mortgage companies, among other consumer financial services entities, follow the same strategies aimed at getting members of the public to act in ways that make the most possible money for the firm.

### 1. *Credit Card Companies*

Businesses engaged in peddling consumer financial products do not guess when it comes to figuring out how best to control consumers' situations to maximize profits: they collect data.<sup>79</sup> As Duncan McDonald, a former general counsel at Citigroup, explains, "The mathematics of virtually everything consumers do is stored, updated, categorized, churned, scored, tested, valued and compared from every possible angle in hundreds of the most powerful computers and by among the most creative minds anywhere."<sup>80</sup> As he adds, "In the past 10 years alone, the transactions of

---

<sup>75</sup> See Eric Schlosser, *Why McDonald's Fries Taste So Good*, ATL. MONTHLY, Jan. 2001, at 50, 52–54.

<sup>76</sup> See Shannon Brownlee, *Portion Distortion—You Don't Know the Half of It*, WASH. POST, Dec. 29, 2002, at B1.

<sup>77</sup> See Benforado et al., *supra* note 61, at 1700–02 (reviewing targeted marketing and advertising campaigns aimed at children).

<sup>78</sup> See SUSAN LINN, CONSUMING KIDS: THE HOSTILE TAKEOVER OF CHILDHOOD 84–89 (2004).

<sup>79</sup> See Bar-Gill & Warren, *supra* note 21, at 23–24.

Sellers collect voluminous statistics about use patterns. Details of every transaction—the place, time, amount, merchant—are carefully recorded and preserved. The data are then combined with information about each customer—name, credit score, address, zip code, payment times, payment places, payment amounts, and so on. For issuers with multiple relationships with the debtor—home mortgage lender, credit card issuer, checking account bank, car lender, etc.—the opportunities to collect data multiply.

*Id.*

<sup>80</sup> Duncan A. MacDonald, *Card Industry Questions Congress Needs to Ask*, AM. BANKER, Mar. 23, 2007, at 10.



200 million Americans have been reviewed in trillions of different ways . . . .”<sup>81</sup> The result is an incredible capacity to effectively tailor products that prey upon existing predispositions and patterns of behavior that consumers may not even know that they exhibit.<sup>82</sup> Throw in advertising budgets that push into the billions of dollars and consumers do not stand a chance.<sup>83</sup>

Having collected and analyzed the data to formulate the most effective consumer strategy, companies begin by sending out millions of credit card brochures, each week, proclaiming in big bold letters: No annual fee! Free flights on any airline! Earn 50,000 bonus points redeemable for select gift cards valued at \$500! Save with a 0% APR on purchases until the end of 2010!

Why do credit card companies offer these goodies and extremely favorable introductory rates?<sup>84</sup> It seems foolish because, given the number of new credit card applications that the average person receives each week, a rational consumer, with little effort, could simply go about switching from card to card and riding a wave of low rates forever, avoiding the high rates that usually kick in after six months or a year. The answer is that corporations know that humans are often not rational, but rather predictably irrational, a fact that has been confirmed by empirical evidence showing that most consumers stick with the cards they sign onto even after teaser rates disappear.<sup>85</sup>

As a next step in influencing consumer behavior, credit card companies insert various provisions, in small print in the actual agreements with

---

<sup>81</sup> *Id.*

<sup>82</sup> Bar-Gill & Warren, *supra* note 21, at 24 (“Variations in use, and in lenders’ possession of detailed use-pattern information, provide an opportunity for some lenders to customize their products to exploit consumer error to its fullest, far more than would be possible with physical products.”).

<sup>83</sup> See ELIZABETH WARREN, OVERVIEW: CONSUMER FINANCIAL PROTECTION AGENCY, <http://www.nnwa.us/documents/CFPA.pdf>.

<sup>84</sup> See Brian Grow & Robert Berner, *About that New, “Friendly” Consumer Contract*, BUS. WK., Apr. 30, 2009, [http://www.businessweek.com/magazine/content/09\\_19/b4130048127451.htm](http://www.businessweek.com/magazine/content/09_19/b4130048127451.htm) (noting that the expansion of the credit card industry in the 1990s resulted in companies offering extremely low “introductory” rates that later skyrocketed).

<sup>85</sup> See Haiyan Shui & Lawrence M. Ausubel, Time Inconsistency in the Credit Market 8–9 (May 3, 2004) (unpublished Ph.D. dissertation, University of Maryland), available at <http://ssrn.com/abstract=586622>. Similarly, researchers have found that ninety percent of consumers who carry credit card debt have liquid assets in accounts that could be easily used to pay off balances carrying very high interest rates. David B. Gross & Nicholas S. Souleles, *Do Liquidity Constraints and Interest Rates Matter for Consumer Behavior? Evidence from Credit Card Data*, 117 Q.J. ECON. 149, 180 (2002).

members of the public, that tip the scales heavily in favor of business. Although the Credit Card Accountability Responsibility Disclosure Act of 2009 is aimed at addressing some of the more consumer-unfriendly tricks,<sup>86</sup> and appears to have already had a significant impact,<sup>87</sup> for years companies have raked in billions as a result of double-digit interest-rate increases, universal default clauses (allowing banks to increase interest rates even when the customer is meeting all of the terms of his or her contract), double-cycle billing (permitting companies to charge interest on money that a customer has already paid back), and provisions allowing the lender to alter the terms of the contract after the money has already been borrowed.<sup>88</sup> The “All terms may change . . . for any reason” provisions have been particularly useful in, among other things, allowing companies to reduce or end the benefits that enticed customers into getting the cards in the first place.<sup>89</sup> Prior to July 2009, nearly every card included such a provision, but as a result of the Credit CARD Act, issuers are now prohibited from altering rates or other terms on outstanding balances.<sup>90</sup> However, companies can still change terms for new transactions, as long as they provide forty-five days advance notice.<sup>91</sup> And issuers are free to raise interest rates on outstanding balances at the end of promotional periods and workout agreements, as a result of a variable index rate, and because payments are sixty or more days late.<sup>92</sup>

More broadly, while the Act has cut down on over-limit fees, mandatory arbitration clauses and “hair trigger” penalty interest rate increases for minor violations, companies seem to have found plenty of room to continue to include advantageous clauses in the fine print.<sup>93</sup> The Pew Charitable Trusts, for example, found in its July 2010 report that

---

<sup>86</sup> See Ron Lieber, *Consumers Are Dealt a New Hand in Credit Cards*, N.Y. TIMES, May 20, 2009, at A4 (reviewing various provisions of the new law).

<sup>87</sup> See PEW HEALTH GROUP, TWO STEPS FORWARD: AFTER THE CREDIT CARD ACT, CREDIT CARDS ARE SAFER AND MORE TRANSPARENT—BUT CHALLENGES REMAIN (2010), [http://www.pewtrusts.org/our\\_work\\_detail.aspx?id=630](http://www.pewtrusts.org/our_work_detail.aspx?id=630) (offering an analysis of the effects of the Act as of July 2010); see also Jennifer Saranow Schultz, *The Effects of the Credit Card Act*, N.Y. TIMES, July 22, 2010, <http://bucks.blogs.nytimes.com/2010/07/22/the-effects-of-the-credit-card-act/?scp=3&sq=%22Card%20Act%22&st=Search>.

<sup>88</sup> See Grow & Berner, *supra* note 84.

<sup>89</sup> See *id.* In 2007, Elizabeth Warren described the patent unfairness in stark terms: “Lenders won’t be bound by any term or price that becomes inconvenient for them, but they will expect their customers to be bound by whatever terms the lenders want to enforce—and to have the courts back them up in case of dispute.” Warren, *Unsafe at Any Rate*, *supra* note 21, at 12.

<sup>90</sup> See PEW HEALTH GROUP, *supra* note 87, at 3.

<sup>91</sup> See *id.*

<sup>92</sup> See *id.* at 5.

<sup>93</sup> See *id.* at 1.

“penalty interest rate practices remain widespread” and “surcharge fees for cash advances rose sharply” following the signing of the Act.<sup>94</sup>

Because these types of provisions are not particularly appealing to consumers, companies have adopted a practice of hiding them in dense agreements of thirty or more pages so that consumers are unlikely to read them and then, to guarantee that consumers only skim through the details, the credit card companies have employed, wherever possible, incomprehensible technical terms like “Cash Equivalent Transactions” and “LIBOR.”<sup>95</sup> Although companies, courts and others often characterize this as full disclosure,<sup>96</sup> it has been well documented that the complexity of the details in solicitations and credit card agreements is beyond the comprehension of many consumers and, in fact, many consumers do not understand the details concerning their cards.<sup>97</sup> And even for those who have the education, natural intelligence and time to make sense of the details, there are so many options that it becomes very difficult to compare different cards.<sup>98</sup>

As a final piece of the strategic puzzle, companies use repetition, hitting consumers early and often by sending out mailing after mailing. In 2005 alone, there were some six billion credit card applications mailed out, not to mention the dozens of other marketing approaches used by consumer financial services entities.<sup>99</sup> The goal has been to reach us in every aspect of our lives—from the art museum show prominently sponsored by Bank of America,<sup>100</sup> to Visa’s fraud protection service alerting videogame players in

---

<sup>94</sup> *Id.* at 2.

<sup>95</sup> See Elizabeth Warren, *Fragile Families: The Vanishing Middle Class*, in *THE ROAD TO THE AMERICAN DREAM: LIFTING WORKING FAMILIES OUT OF POVERTY* 38, 48 (John Edwards et al. eds., 2007) (“In the mid-1980s the typical credit-card contract was about a page long; today it is more than 30 pages, often of dense legalese that even a lawyer cannot understand.”).

<sup>96</sup> *Cf. infra* notes 115–125 and accompanying text (discussing the Supreme Court’s understanding of when terms in a contract are enforceable).

<sup>97</sup> See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, *CREDIT CARDS: INCREASED COMPLEXITY IN RATES AND FEES HEIGHTENS NEED FOR MORE EFFECTIVE DISCLOSURES TO CONSUMERS* 6 (2006), <http://www.gao.gov/new.items/d06929.pdf>; MACRO INT’L, INC., *DESIGN AND TESTING OF EFFECTIVE TRUTH IN LENDING DISCLOSURES*, at ii–x (2007) (providing a list of terms that many consumers do not understand, including “what event might trigger a default APR,” “what fees are associated with the credit card product,” and “how payments are allocated among different rate balances”).

<sup>98</sup> See Bar-Gill & Warren, *supra* note 21, at 115 (noting that Bank of America provides a choice of over 400 different credit cards).

<sup>99</sup> Warren, *supra* note 95, at 48.

<sup>100</sup> See, e.g., National Gallery of Art Exhibitions J.M.W. Turner (Oct. 1, 2007–Jan. 6, 2008), <http://www.nga.gov/exhibitions/turnerinfo.shtm>.

Ubisoft's *CSI: 3 Dimensions of Murder* that their credit card has just been stolen,<sup>101</sup> to the endless stream of television commercials, magazine advertisements and bus stop billboards from American Express.<sup>102</sup>

Like fast food companies, some of the credit industry's favorite targets have been the young. In 2006, the Department of Defense, concerned about marketing to new recruits, provided this report:

Predatory lenders seek out young and financially inexperienced borrowers who have bank accounts and steady jobs, but also have little in savings, flawed credit or have hit their credit limit . . . . Most of the predatory business models take advantage of borrowers' inability to pay the loan in full when due and encourage extensions through refinancing and loan flipping.<sup>103</sup>

Prompted by such complaints, the Credit CARD Act attempts to address the problem of targeting young people, by significantly restricting the ability of those under age twenty-one from getting cards without co-signers or proof of sufficient income.<sup>104</sup>

Yet the Act has not dealt with a related problem and one of credit card companies' prized tactics: exploiting familial ties to reach into the pockets of those with whom there is no formal contract.<sup>105</sup> In essence, credit card companies think about their customers not as isolated "individuals" but as "units." As I have suggested elsewhere, "The ideal unit is composed of an inexperienced and cash-strapped member of the credit generation and an older relative who is skeptical of debt, cares about the younger relation (and the family reputation), and has savings to dip into. The first half of the unit

---

<sup>101</sup> See Lilia Gutnik et al., *New Trends in Product Placement* 15 (Spring 2007) (unpublished manuscript, on file with University of California, Berkeley), available at <http://people.ischool.berkeley.edu/~hal/Courses/StratTech09/Tech/Preso/D-placement.doc>.

<sup>102</sup> See *infra* notes 144–145 and accompanying text (describing one recent American Express campaign).

<sup>103</sup> U.S. DEP'T OF DEF., *REPORT ON PREDATORY LENDING PRACTICES DIRECTED AT MEMBERS OF THE ARMED FORCES AND THEIR DEPENDENTS* 4 (2006), [http://www.defense.gov/pubs/pdfs/report\\_to\\_congress\\_final.pdf](http://www.defense.gov/pubs/pdfs/report_to_congress_final.pdf).

<sup>104</sup> See *Under 21? No Credit Card For You*, MSN, June 12, 2009, <http://articles.moneycentral.msn.com/Banking/YourCreditRating/under-21-no-credit-card-for-you.aspx?page=2>.

<sup>105</sup> See Warren, *Unsafe at Any Rate*, *supra* note 21 (bemoaning the practice of "lur[ing] 18-year-olds with no income and no credit history into debt with promises of 'no parental approval'—on the assumption that their parents will pay it off, rather than see their children begin their adult lives with ruined credit histories"). While the Credit CARD Act addresses the age issue, it does not prohibit exploiting the love and concern of fiscally responsible parents, grandparents, uncles, and aunts.

charges and charges and charges; the second half pays and pays and pays.”<sup>106</sup>

## 2. *A Broader Story*

The story of controlling consumers' situations to dictate profitable behavior is very similar when it comes to mortgages, payday loans and other financial products. In the mid-2000s, for example, mortgage companies, like their friends in the credit card business, began heavily pushing mortgages with “teaser” rates.<sup>107</sup> Drawing in customers with seemingly favorable terms, flowery rhetoric on the benefits of home ownership, and offers of “objective” guidance on navigating the sea of mortgage possibilities, lenders then deliver pages and pages of documents right before closing that are often completely opaque to the homebuyer, but contain extremely advantageous provisions for the mortgage company and/or broker.<sup>108</sup> The complexity of these provisions makes comparison shopping impossible and helps to disguise the fact that many consumers could qualify for less expensive loans.<sup>109</sup>

Whatever the industry, manipulating consumer situations to produce the most profitable consumer behavior is a tried and true approach. Companies that simply sit back and listen to consumer wants and desires are bound to be outcompeted by those who create wants and desires.

It is not that all of these corporate actors are somehow consciously taking social psychological insights and using that knowledge to deliberately control consumer choices. Rather, the rules and norms of business lead corporations to find the most effective tools to manage consumer behavior. Corporate law tells corporate actors that their singular and overriding purpose is to maximize shareholder profit.<sup>110</sup> And this legal

---

<sup>106</sup> See Adam Benforado, *Exploiting Familial Ties*, CONCURRING OPINIONS (Dec. 21, 2009, 6:57 AM), <http://www.concurringopinions.com/archives/2009/12/exploiting-familial-ties.html#comments>.

<sup>107</sup> See Grow & Berner, *supra* note 84.

<sup>108</sup> For an overview, see Bar-Gill & Warren, *supra* note 21, at 129–30, 138–143.

<sup>109</sup> See *id.*; see also Warren, *Unsafe at Any Rate*, *supra* note 21 (noting that “Fannie Mae estimates that fully 50 percent of those who were sold ruinous subprime mortgages would have qualified for prime-rate loans . . . [and that] the Department of Housing and Urban Development revealed that one in nine middle-income families (and one in 14 upper-income families) who refinanced a home mortgage ended up with a high-fee, high-interest subprime mortgage.”).

<sup>110</sup> Probably the most well-known formulation of the shareholder primacy norm comes from the case of *Dodge v. Ford Motor Co.*:

A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be

dictate is supported by common understandings of what corporations are supposed to do: make money.<sup>111</sup> As Milton Friedman has written, “[T]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.”<sup>112</sup> With incredible resources at their disposal to fulfill their charge,<sup>113</sup> corporate actors inevitably figure out how best to increase the wealth of the firm: which means engaging in just the type of careful manipulations explored in the previous pages.<sup>114</sup> In a dispositionist world, in which people are understood to be rational, autonomous actors, the come-ons, fine print and hard sell techniques do not even feel exploitative—they can be easily framed as catering to the “real” or “hidden” desires of the public.

---

exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.

Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919). According to Stephen Bainbridge, today, “the shareholder wealth maximization norm . . . has been fully internalized by American managers.” Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21 J. CORP. L. 657, 717 (1996).

<sup>111</sup> As Marjorie Kelly has summarized,

Corporations are believed to exist for one purpose: to maximize returns to shareholders. This message is reinforced by CEOs, The Wall Street Journal, business schools, and the courts. It is the guiding idea of the public corporation, and the law of the land—much as the divine right of kings was once the law of the land. Indeed, the notion of “maximizing returns to shareholders” is universally accepted as a kind of divine, unchallengeable truth.

Marjorie Kelly, *Why All the Fuss About Stockholders?*, 11 BUS. ETHICS 5 (1997).

<sup>112</sup> Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES, Sept. 13, 1970; see also Interview by John McClaughry with Milton Friedman, in *Milton Friedman Responds*, CHEMTECH, Feb. 1974, at 72 (“So the question is, do corporate executives, provided they stay within the law, have responsibilities in their business activities other than to make as much money for their stockholders as possible? And my answer to that is, no they do not.”).

<sup>113</sup> As a result of their tremendous assets and power, corporations have an incredible ability to dominate our situations. Indeed, just the twenty largest revenue-producing American companies brought in \$3.2 trillion in revenue in 2008 and \$2.8 trillion during the recession year of 2009. *Fortune 500 2009: Our Annual Ranking of America's Largest Corporations*, CNN, May 4, 2009, [http://money.cnn.com/magazines/fortune/fortune500/2009/full\\_list/](http://money.cnn.com/magazines/fortune/fortune500/2009/full_list/); *Fortune 500 2010: Our Annual Ranking of America's Largest Corporations*, CNN, May 3, 2010 [http://money.cnn.com/magazines/fortune/fortune500/2010/full\\_list/](http://money.cnn.com/magazines/fortune/fortune500/2010/full_list/).

<sup>114</sup> See *supra* notes 72–109 and accompanying text.

B. *Negating the Case for Regulation or Liability*

The greatest boon for business is that our tendency to focus on disposition not only allows business entities to maximize profits but it also allows them to avoid regulation and liability. When someone gets fat, or goes into debt, or can't pay his mortgage, who is to blame? Our dispositionist attributional tendency provides a clear and ready answer. The person is, not the corporation: he should have exercised personal responsibility; she should have been self-disciplined; they should have made informed, good choices. Rather than complaining afterwards or looking for an underserved handout, they should have read through their credit card application in the first place. The details were stated in black and white. If they did not understand a term in the agreement, they should have asked someone, or they should have stuck with paying cash for goods. No one pointed a gun to their heads. These people chose immediate pleasure in the form of flat screen televisions, iPods and eating out, ran up a large bill, and now think that they should be able to get out of paying the consequences. Those other folks? They shouldn't have bought a house that they couldn't afford if their child got sick or they lost their job. They were greedy. The subprime mortgage they signed onto is not a good or bad product; how things turn out depends entirely on the consumer. And that man with the ever-expanding waistline? Don't like being overweight? Well, get off the couch and go running. No one ever told him to eat nothing but McDonald's every day.

With the dispositionist narrative, the causal link necessary to justify regulating corporate behavior or forcing a corporation to compensate a consumer is destroyed. The dynamic is evident in both contract and tort law, as well as in the processes and structures of the administrative state.

Consider the Supreme Court majority's approach in *Carnival Cruise Lines v. Shute*, a case addressing whether consumers should be prevented from suing a cruise ship company in a forum of their choice because of the existence of a provision in the travel contract stating that the company could only be sued in Florida.<sup>115</sup> Operating from a dispositionist frame of mind, the majority found this to be an easy case: the consumers should obviously be barred from bringing suit in their home state of Washington.<sup>116</sup> Justice Harry Blackmun, delivering the opinion of the Court, started by detailing the exact wording that appeared on the face of the ticket and the first page of the ticket contract,<sup>117</sup> then noted that the consumer respondents "essentially" conceded that they had seen or could

---

<sup>115</sup> *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587–88 (1991).

<sup>116</sup> *Id.* at 589.

<sup>117</sup> *Id.* at 587–88.

have seen the forum selection clause,<sup>118</sup> and finally pointed out that there was nothing to suggest any autonomy-usurping “bad-faith motive” or coercion on the part of the cruise company.<sup>119</sup> These facts, according to Justice Blackman, doomed the consumers’ case: if the forum-selection clause was clearly written in the contract—and there was no “fraud or overreaching” by the company—then rational individuals could exercise free choice and decide for themselves whether the cruise was still a good deal.<sup>120</sup> The fact that Eulala and Russel Shute bought the tickets, when they “presumably retained the option of rejecting the contract with impunity,” was proof that they preferred taking the cruise, with a restriction on their ability to bring suit later, over the other things they might have spent their money on.<sup>121</sup>

The line of argument seems fairly convincing, but the dispositionist mindset is so overpowering and the “free choice” narrative so intuitive that it can blind us to important situationalizing details, as the dissent argued in the case.<sup>122</sup> As Justice John Paul Stevens pointed out, if one looks at the actual printed contract (a copy of which he included in his opinion), one begins to notice the powerful situational constraints that consumers, including the Shutes, faced. Among other things, the forum-selection clause is printed in type that is so small that it is barely legible and hidden in the eighth of twenty-five numbered paragraphs.<sup>123</sup> Moreover, many consumers have no opportunity to read the relevant paragraph in the contract until they have already purchased the ticket, at which point they will also discover that they have accepted a condition, which provides that the carrier will not make any refunds.<sup>124</sup> In addition, Justice Stevens notes that one must consider the broader context of the overall contract—real human beings do not engage “the terms of contracts of adhesion, form contracts offered on a take-or-leave basis by a party with stronger bargaining power to a party with weaker power,” in the same way that they engage terms in ordinary fairly-bargained-for contracts, even if they are given a full opportunity to inspect the details in both instances.<sup>125</sup> All of these factors undermine Justice Blackman’s dispositionist account, but because they require a great amount of extra effort to appreciate and go against our notions of how the world works, they are very easy to miss.

---

<sup>118</sup> *Id.* at 590.

<sup>119</sup> *Id.* at 595.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* As the majority explained further, “[I]t stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.” *Id.* at 593.

<sup>122</sup> *Id.* at 597–605.

<sup>123</sup> *Id.* at 598.

<sup>124</sup> *Id.* at 598–99.

<sup>125</sup> *Id.* at 600.



The same cognitive barrier to establishing liability can be seen in tort law cases and in the regulatory sphere.<sup>126</sup> As just one illustrative example, in dismissing a lawsuit brought on behalf of obese customers against McDonald's for obesity and health problems associated with eating McDonald's food, Federal District Judge Robert Sweet offered a nearly identical argument to Justice Blackman in *Carnival Cruise Lines*: where there is no salient evidence of a company actively forcing someone to purchase their product or evidence that the company completely hid relevant information from the consumer, then the individual can be considered to have freely chosen to contract with the company and must be solely responsible for the consequences of that choice.<sup>127</sup> In the words of Judge Sweet, since "[n]obody is forced to eat at McDonalds,"<sup>128</sup> "[i]f consumers know (or reasonably should know) the potential ill health effects of eating at McDonalds, they cannot blame McDonalds if they, nonetheless, choose to satiate their appetite with a surfeit of supersized McDonalds products."<sup>129</sup> As with *Carnival Cruise Lines*, the reasoning seems completely sound, until one invests the time and energy to appreciate the numerous situational constraints placed on consumers—many of which are deliberately constructed by the company to produce the behavior that it derides in court. If, as an industry spokesman quoted in the *Pelman* opinion explained, "anyone with an IQ higher than room temperature will understand that excessive consumption of food served in fast-food restaurants will lead to weight gain"<sup>130</sup> and people abhor being overweight, how is it that so many Americans with IQs higher than room temperature consume excessive amounts of fast food? The explanation is that something other than consumer's awareness of the healthiness of McDonald's hamburgers, french-fries and milkshakes is driving their behavior. As suggested earlier in this Article and chronicled in detail in other work, that "something" is, in large part, a complex array of tactics developed by corporations to encourage overconsumption.<sup>131</sup>

---

<sup>126</sup> See Benforado et al., *supra* note 61, at 1782–95.

<sup>127</sup> *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 533 (S.D.N.Y. 2003).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 517–18; see also *id.* at 533 ("If a person knows or should know that eating copious orders of supersized McDonalds' products is unhealthy and may result in weight gain . . . it is not the place of the law to protect them from their own excesses.").

<sup>130</sup> *Id.* at 518 n.5.

<sup>131</sup> See *supra* notes 74–78 and accompanying text; Benforado et al., *supra* note 61.

#### IV. MAINTAINING ADVANTAGEOUS ATTRIBUTIONS

##### A. *Encouraging a Perception of Consumer Control and Choice*

The dispositionist outlook is not only the natural way of looking at the world—whether we are judges, jurors, policy makers, or everyday citizens—it is also the narrative being sold to us, everywhere we turn. While business interests are busy manipulating our situations to produce profit-enhancing consumer behavior, they are also expending significant resources to reassure us that we are the ones dictating the terms of the relationship.<sup>132</sup> You, American consumer, are in control. You have options and you exercise free choice. You are a rational, autonomous individual with stable preferences. We, American businesses, are here to serve your needs and wants. We don't manipulate your preferences or decision-making; we simply respond.

Hence, while offering highly addictive products designed to usurp the autonomy of the consumer, cigarette companies have sold us the image of the Marlboro man—the rugged individualist, blazing his own trail.<sup>133</sup> No one makes that guy smoke—he chooses.<sup>134</sup> For years, Virginia Slims with their slogans “You’ve come a long way, baby” and “Find Your Voice” have played explicitly on women’s independence and empowerment.<sup>135</sup> As one of their advertisements reads, “I look temptation right in the eye and then I make my own decision.”<sup>136</sup>

Fast food companies engrain the same narrative. What are the first words when you walk into a fast food restaurant? “How can I help you?” Any questions about who is in control? At Burger King, they literally give you a paper crown in case you missed that you’re the sovereign consumer.<sup>137</sup> “Have it your way.”<sup>138</sup> You’re the king. And to drive home

<sup>132</sup> Benforado et al., *supra* note 61, at 1708–15.

<sup>133</sup> See Kathleene Schalch, *The Marlboro Man* (NPR radio broadcast Oct. 21, 2002), available at <http://www.npr.org/programs/morning/features/patc/marlborman/index.html>. See generally TARA PARKER-POPE, CIGARETTES: ANATOMY OF AN INDUSTRY FROM SEED TO SMOKE 73–108 (2001) (offering an overview of tobacco company marketing campaigns).

<sup>134</sup> As Jack Landy, the Marlboro brand manager at Philip Morris in the 1960s, explained, the Marlboro man “was his own man in a world he owned.” Schalch, *supra* note 133.

<sup>135</sup> See AM. LUNG ASS'N, DEADLY IN PINK: BIG TOBACCO STEPS UP ITS TARGETING OF WOMEN AND GIRLS 2 (2009), available at <http://www.lungusa.org/assets/documents/publications/other-reports/deadly-in-pink.pdf>.

<sup>136</sup> Virginia Slims Advertisement (on file with author).

<sup>137</sup> *Hungry Fans Get Taste of “The Twilight Saga: New Moon” from Burger King Corp.*, BURGER KING, Nov. 16, 2009, <http://investor.bk.com/phoenix.zhtml?c=87140&p=RssLanding&cat=news&id=1355600> (referencing Burger King’s “iconic paper crowns”).

the message, BK has initiated marketing campaigns like the one for the TenderCrisp sandwich called "Subservient Chicken."<sup>139</sup> As part of the campaign, you can visit the Burger King website and then give direction to a person in a chicken suit to behave any way you want.<sup>140</sup> The tag line is "Chicken the way you like it."<sup>141</sup> While the chicken domination experience may be unique to Burger King, the message of consumer autonomy is common to the marketing of all fast food chains and, indeed, American businesses in numerous other industries.<sup>142</sup>

In the years leading up to the credit crisis of 2008, financial services entities mouthed the same lines: that consumers are in control, that they are rational actors, and that financial services companies are just there to listen and respond with objective analysis. As one Fidelity advertisement from 2002 explained, "You are not the kind of investor who blindly reacts to each and every new market condition. You're informed. You're involved. You're focused. . . . Being in control of your financial future has never been more important. . . . THERE ARE BULLS AND BEARS. BUT YOU ARE A THINKING ANIMAL."<sup>143</sup>

In 2004, American Express introduced its global card brand campaign, "My life. My card."<sup>144</sup> The campaign was centered on using celebrity spokespeople, but not just any celebrities. Indeed, the common theme of the lineup was each person's uniqueness and individuality—these were people who marched to their own drummers (that is, clear autonomous agents). The comedian Ellen Degeneres. The indie filmmaker Wes Anderson. The surfer Laird Hamilton. The outspoken soccer coach Jose Mourinho. Thus, the message was not just that "achievers of all types choose American Express,"<sup>145</sup> but that choice and independence is precisely what American Express offers. No one tells Ellen Degeneres who she can or cannot love. No one tells Laird Hamilton that a wave is too big or dangerous to master. No one tells Robert De Niro what he can or cannot

---

<sup>138</sup> BURGER KING, <http://www.bk.com/> (last visited Aug. 25, 2010).

<sup>139</sup> *Advertisement, Burger King: Subservient Chicken*, <http://www.bk.com/en/us/campaigns/subservient-chicken.html> (last visited Aug. 10, 2010).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> Benforado et al., *supra* note 61, at 1709–15.

<sup>143</sup> Full Page Advertisement: Fidelity Investments, N.Y. TIMES, July 14, 2002, at A15.

<sup>144</sup> Press Release, Am. Express, Kate Winslet Latest Addition to Global "My Life, My Card (SM)." Communications Campaign from American Express (May 18, 2005).

<sup>145</sup> *American Express Launches Largest Brand Campaign in Canada*, CNW, Apr. 18, 2005, <http://www.newswire.ca/en/releases/mmnr/amex/>.

do. They decide. They make their own way. And their actions certainly are not dictated by a credit card company.

In 2006, Discover Card launched a new national advertising campaign highlighting “the Company’s commitment to giving consumers more of what’s important to them,”<sup>146</sup> in particular “more complete control over their account and finances.”<sup>147</sup> As Margo Georgiadis, Executive Vice President and Chief Marketing Officer of Discover Financial Services described, “We want to redefine how consumers think about their relationship with a credit card company by putting consumers back in the driver’s seat so they have complete confidence in using credit to their advantage.”<sup>148</sup>

In 2007, Bank of America, the nation’s number one credit card issuer, introduced the “Bank of Opportunity” campaign.<sup>149</sup> As the bank explained in a press release, the goal was to convey that Bank of America is dedicated to “helping consumers realize their financial opportunity.”<sup>150</sup> In other words, Bank of America does not coerce, steer, or dictate; it listens to where consumers want to go and then helps them reach that destination. “Bank of America provides customers with financial opportunities best suited for their needs now and in the future. Whether they are just beginning to save or have a long term financial goal, we are with them every step of the way.”<sup>151</sup> Capital One offers an almost identical message on its website, which contains a picture of a smiling man holding a compass and two women looking at a hiking map, with the words, “Can we point you in the right direction?”<sup>152</sup>

In all of these campaigns leading up to the great recession, the dispositionist narrative was clear: the consumer is sovereign and credit card companies are here to serve. In the words of a particularly over-the-top advertisement from Standard Chartered Platinum Card, “Now you can own anything, anytime, anywhere.”<sup>153</sup>

---

<sup>146</sup> Press Release, Discover Fin. Serv., Discover Card Launches New National Advertising Campaign (Aug. 24, 2006), *available at* <http://pressroom.discovercard.com/data/articles/2006/08/24/200608241122300.shtml>.

<sup>147</sup> *Id.* (The campaign was meant to convince members of the public that Discover “understands their needs and is committed to giving them more of what they want and less of what they don’t.”).

<sup>148</sup> *Id.*

<sup>149</sup> *Bank of America Debuts Next Phase of ‘Bank of Opportunity’ Campaign*, PR NEWswire, May 15, 2010, <http://www.prnewswire.com/news-releases/bank-of-america-debuts-next-phase-of-bank-of-opportunity-campaign-57254252.html>.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> CAPITAL ONE, <https://www.capitalone.com/> (last visited Aug. 10, 2010).

<sup>153</sup> Murray, *Misleading Credit Card Advertising*, SQUARECIRCLEZ, (June 4, 2007), <http://www.squarecirclez.com/blog/misleading-credit-card-advertising/650>.

### B. *Five Strategies for Addressing Negative Outcomes*

Although there are great benefits in engraining the dispositionist mindset that the American consumer public is in control, that it is making free choices and that business entities simply respond to whatever the public tells them to do, occasionally there are outcomes that are just so bad or pervasive that they cannot be ignored.

Consider the credit crisis that reached a crescendo in the fall of 2008 as hundreds of billions of dollars of mortgage-related investments collapsed. The negative impact on existing institutions was immense: the largest insurance company in the United States was taken over by the government, huge investment banks were wiped out, Congress was impelled to fund a \$700 billion bailout plan and a \$787 billion economic stimulus plan, General Motors and Chrysler were forced into bankruptcy, the Federal Reserve was driven to buy up a trillion dollars in mortgage-related securities, and, as the destabilization spread beyond our shores, countries like Iceland and Pakistan were induced to turn to the International Monetary Fund for emergency aid.<sup>154</sup>

The negative impact on individuals has been just as significant, with tightened credit, thousands of lost jobs, and other severe economic effects, many of which continue to this day.<sup>155</sup> During the first half of 2010, foreclosures increased in 154 out of 206 U.S. metropolitan areas with populations of 200,000 or greater.<sup>156</sup> The result was 1.6 million foreclosures during the first six months of the year.<sup>157</sup> Prompted by foreclosures and lost jobs, there were thirty-two percent more personal bankruptcy filings in 2009 than in 2008—the highest level since 2005 when large numbers of Americans sought to declare bankruptcy before the new bankruptcy act went into effect.<sup>158</sup> And these harms have ripple effects on many other areas and many other people. When houses are foreclosed, the normal sale prices in neighborhoods plummet, which in turn undermines the housing market's stability and feeds back into broader economic declines.<sup>159</sup> Likewise, suffering as a result of bankruptcy does not tend to be confined to those doing the filing: for each person filing for bankruptcy,

---

<sup>154</sup> See *Credit Crisis—The Essentials*, N.Y. TIMES, July 12, 2010, [http://topics.nytimes.com/top/reference/timestopics/subjects/c/credit\\_crisis/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/c/credit_crisis/index.html) (providing an excellent, concise overview of the crisis).

<sup>155</sup> See *id.*

<sup>156</sup> Dina ElBoghdady, *Foreclosure Activity Rises in Most Major Metropolitan Areas*, WASH. POST, July. 30, 2010, at A14.

<sup>157</sup> *Id.*

<sup>158</sup> Sara Murray & Conor Dougherty, *Personal Bankruptcy Filings Rising Fast*, WALL ST. J., Jan. 5, 2010, at A3.

<sup>159</sup> ElBoghdady, *supra* note 156.

there is often a child or elderly adult dependent in the household who is directly impacted.<sup>160</sup>

Focusing on foreclosures and bankruptcies, however, misses the larger harm linked to the credit crisis. Even before the crisis really took hold two years ago, the numbers were staggering: in 2007, nearly one out of two credit card holders missed at least one payment,<sup>161</sup> and more than two million families had missed at least one mortgage payment.<sup>162</sup> In 2004, 15.8% of Americans dealt with a debt collector of some kind,<sup>163</sup> a number that is likely to have steeply risen given that the Federal Trade Commission reported a fifty percent increase in complaints of harassment by debt collectors in 2009.<sup>164</sup> Overall, in 2006, consumers were assessed a total of more than \$89 billion by credit card companies for various interest payments, fees and other costs.<sup>165</sup>

So how does business respond when these types of bad outcomes occur?

It is important to note, at the outset, that corporate entities can rely to a significant degree on the natural dispositionism of those outside the business enterprise. There are many politicians, members of the media, and regular citizens who, without any additional prompting, will vigorously attack the idea that anyone or anything but the overweight individual, the man who lost his house to foreclosure, or the woman swamped in credit card debt, is to blame for his or her unenviable position and eagerly defend against the suggestion that corporations are responsible. That is the power of our basic attributional framework, which, as described earlier, is reinforced by messages we receive in advertising and numerous other social and cultural exchanges.<sup>166</sup> When it comes to institutions, the *Wall Street Journal* is not in bed with any particular company, but its readership is

---

<sup>160</sup> See Elizabeth Warren, *Bankrupt Children*, 86 MINN. L. REV. 1003, 1010 (2001–2002) (showing that in 2001, there were 1.8 million people who filed for bankruptcy and 1.9 million children and elderly adults who lived in bankrupt households).

<sup>161</sup> Walecia Konrad, *What Americans Say about Credit Cards*, BANKRATE, Feb. 20, 2007, at 3, [http://www.bankrate.com/brm/news/financial\\_literacy/Feb07\\_credit\\_card\\_poll\\_national\\_a1.asp](http://www.bankrate.com/brm/news/financial_literacy/Feb07_credit_card_poll_national_a1.asp).

<sup>162</sup> Sandra Block, *Foreclosure Hurts Long after Home's Gone, So Cut a Deal While You Can*, USA TODAY, Mar. 23, 2007, at 3B.

<sup>163</sup> Tom W. Smith, *Troubles in America: A Study of Negative Life Events Across Time and Sub-Groups* 23 (Jan. 2005) (unpublished manuscript), available at <http://www-news.uchicago.edu/releases/05/051228.troubles.pdf>.

<sup>164</sup> Jennifer Bragg, *Protect Yourself from Debt Collectors*, CNNMONEY.COM, July 19, 2010, [http://money.cnn.com/2010/07/19/pf/saving/debt\\_collectors\\_your\\_rights/index.htm](http://money.cnn.com/2010/07/19/pf/saving/debt_collectors_your_rights/index.htm).

<sup>165</sup> See Warren, *Unsafe at Any Rate*, *supra* note 21.

<sup>166</sup> See *supra* notes 132–53 and accompanying text.

made up of mostly conservative business-oriented people and it happens to be part of the media empire controlled by the outspoken conservative Rupert Murdoch. As a result, the paper, without any backroom deals or shenanigans, is more likely to publish editorials and opinion pieces that promote ideas of personal responsibility, rather than articles that blame corporations. The same might be said of Fox News, which is also owned by Murdoch's News Corp. It has a certain viewership and perspective and can be counted on to beat the dispositionist drum in support of corporations potentially implicated in bad outcomes.

At the same time, in a crisis, corporations do not leave anything to chance. They tweak advertising and marketing campaigns to play up certain angles that highlight their innocent position. They directly lobby government officials and use lawyers to control public perceptions. And they work the press to cast their roles in a certain light. Perhaps most importantly, they utilize third-party messengers. Respected third-party messengers are critical because they appear objective and authoritative.<sup>167</sup>

In response to [such a] need for third party messengers, corporate interest groups have adopted a strategy of sponsoring knowledge production on a variety of levels that can appeal to a variety of audiences—from giving grants to scholars at elite universities and seed money to think tanks to promoting popular media and acting through public relations firms—all of which can credibly be deployed as “independent” of the industry itself.<sup>168</sup>

With respect to managing the potential regulatory response to the credit crisis, the United States Chamber of Commerce has been particularly active. With an immense budget, and “a professional staff of hundreds of the nation's top policy experts, lobbyists, lawyers, and communicators,” the Chamber has a unique ability to frame the terms of debate—and advance a dispositionist mission of promoting “human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity, and responsibility”—while not directly implicating any particular businesses that happen to be members.<sup>169</sup> Indeed, the organization spent \$91.7 million just on lobbying Congress and federal

---

<sup>167</sup> See Benforado et al., *supra* note 61, at 1728–33.

<sup>168</sup> *Id.* at 1729.

<sup>169</sup> *About Us*, U.S. CHAMBER OF COMMERCE, <http://library.uschamber.com/about> (last visited Aug. 10, 2009) (“It is the policy of the U.S. Chamber of Commerce not to distribute or make public information about [its] members.”); *Frequently Asked Questions, Can I Get a List of Chamber Members?*, U.S. CHAMBER OF COMMERCE, <http://library.uschamber.com/about> (last visited Aug. 10, 2009).

agencies in 2008 and \$144.5 million in 2009.<sup>170</sup> Much of the Chamber's vigorous coordinated attack on proposals for a new consumer financial protection agency, however, went beyond meeting with members of Congress and their staffs and circulating talking points for Sunday morning news programs. The goal was to capture a broader audience by advertising in publications and websites, like *Politico*, *The Hill* and the *Drudge Report*, taking out radio and television advertisements in key markets, and facilitating letter and op-ed writing by members of the public.

If these are the various battalions in the clash over attributions when a harm has been committed potentially implicating American business, what are the weapons—the arguments that often carry the day? The section that follows unpacks five that have proven to be particularly effective. These are, of course, not the only strategies, but they are common and have special relevance to the fight over a new consumer financial protection bureau. Each one is a potent armament in its own right, but used concurrently—as they often are—they can prove to be overwhelming to those in the opposition. What all five share is that they all play upon our dispositionist tendencies. Among other things, they frame the important facts in ways that maximize the apparent causal role of bad individual choices and corrupted souls and minimize the influence of elements in our situations. They ratchet up our sense of threat to the self, group, and system to encourage our dispositionism. They tap into our natural preference for remedies aimed at punishing evil, greedy and imprudent people, rather than fixing the complicated environmental forces and structures around us that are the far more significant source of our troubles. The subsections that follow show that our attributions matter—indeed, they may be the single most important factor in shaping the relationship between business, government and the public.

### 1. *Blame the Victim*

As suggested before, our strong motivation to believe that our systems are just and legitimate, and that people get what they deserve in life, can naturally result in us blaming the victim when bad things happen.<sup>171</sup> In the last two years, corporations and their allies have tapped into this tendency to maintain our belief in a just world by finding fault in the behavior of those who have suffered harms. In particular, they have done this by asserting causal narratives focused on the corrupted dispositions and poor choices of those who have been forced to declare bankruptcy or lost their

---

<sup>170</sup> *Lobbying: U.S. Chamber of Commerce*, CENTER FOR RESPONSIBLE POL., <http://www.opensecrets.org/lobby/clientsum.php?year=2009&lname=US+Chamber+of+Commerce&id=> (last visited Aug. 10, 2010).

<sup>171</sup> See *supra* notes 67–70 and accompanying text.



homes to foreclosure. Once again, reinforcing that certain consumers are to blame, allows business to avoid liability and regulation.

The specific narrative has focused on two somewhat contradictory notions: first, that consumers who fell deeply into debt were stupid or foolish in the years leading up to the great recession, and, second, that consumers were rational and opportunistic.

Perhaps the best example of the first theme came in CNBC correspondent Rick Santelli's now famous rant to cheering traders on the floor of the Chicago Mercantile Exchange about the "bad behavior" of the "losers" whose homes were being foreclosed around the country.<sup>172</sup> Addressing the cheering traders around him, whom he described as "a pretty good statistical cross-section of America, the silent majority," Santelli suggested that a better solution to the economic meltdown than creating programs to help Americans badly mired in debt was to "buy cars and buy houses in foreclosure and give them to people that might have a chance to actually prosper down the road, and reward people that could carry the water instead of drink the water."<sup>173</sup> Thus, from Santelli's perspective, the government had gotten it backward and was distorting the natural process of our just system in which good, smart hardworking people are rewarded and bad, foolish, lazy people are punished: the reason that certain people were being evicted from their homes and losing their possessions was because they were malingerers.

Although taking on the issue from a different approach, the second theme—that many consumers were actually well-informed, but greedy—was also quite common as financial reform efforts were underway and shared the view that the cause of the problem lay in the bad dispositions of those who were cast out on the street as the market crashed. As Todd Zywicki wrote in the *Wall Street Journal*, "The financial crisis resulted primarily from the rational behavior of borrowers and lenders responding to misaligned incentives, not fraud or borrower stupidity."<sup>174</sup> Arguing that at least as many borrowers defrauded lenders as lenders defrauded borrowers, Zywicki traced the locus of the problem to "speculators and home-flippers"—opportunistic agents working the system and looking to get rich quick.<sup>175</sup> Michael Cavino offered an almost identical set of conclusions in a letter to the *Journal* arguing that many mortgages "were taken out by

---

<sup>172</sup> *Santelli's Tea Party* (CNBC television broadcast Feb. 19, 2009), available at <http://www.cnbc.com/id/15840232?video=1039849853>.

<sup>173</sup> *Id.* As Santelli went on to ask, "How many of you people want to pay for your neighbor's mortgage that has an extra bathroom and can't pay their bills?" *Id.*

<sup>174</sup> Todd Zywicki, *Complex Loans Didn't Cause the Crisis*, WALL ST. J., Feb. 19, 2010, at A15 ("[T]he problem isn't consumer gullibility or ignorance. Borrowers have shown they understand, and act on, the incentives they face all too well.").

<sup>175</sup> *Id.*

individuals who were looking to make a quick profit with little money down, or others who provided incomplete or deliberately misleading information on their mortgage applications.”<sup>176</sup> In Richard Posner’s estimation, nothing in these mortgage agreements that reformers pointed to was really beyond “the cognitive competence of the average home buyer.”<sup>177</sup> Sure, “prepayment penalties on mortgages . . . do make refinancing more costly, but mortgages that include such penalties compensate by charging a lower interest rate.”<sup>178</sup> Santelli’s “losers” were trying to have it both ways: getting the upside when things were good and then walking away from their responsibilities when things went sour. In our dispositionist mindset, in which people ought to pay for the consequences of their actions, good or bad, this was—and is—unacceptable.

One of the reasons for the success of rhetoric focused on confining the cause of the harm to the corrupted interiors of the debt-ridden is that it also appears to recruit strong ingroup-outgroup feelings, which is important because, as discussed earlier, our dispositionism is particularly strong when it comes to the actions of outgroup members, and outgroup competition or threat increases the likelihood that we will make dispositionist attributions.<sup>179</sup> This may go some distance to understanding the recurring emphasis on placing government-sponsored efforts at “encouraging lending to allegedly under-served populations” at the forefront of discussions about the causes of the economic crisis.<sup>180</sup> Mentioning poor minorities as potential culprits is particularly likely to raise our dispositionist hackles and allow business entities to avoid being implicated in the harms arising from the credit crisis.

Overall, if consumers are not the victims but rather the catalysts of the economic debacle, it makes little sense to create an agency like the CFPB to ensure their safety. We would be better off letting them stew in their own juices, or as Cavino put it in his *Wall Street Journal* letter, “[T]he solution

---

<sup>176</sup> Michael Cavino, Letter to the Editor, *More Bureaucracy Won’t Prevent Future Meltdowns*, WALL ST. J., Feb. 16, 2010, at A18.

<sup>177</sup> Richard A. Posner, *Treating Financial Consumers as Consenting Adults*, WALL ST. J., July 23, 2009, at A15.

<sup>178</sup> *Id.*

<sup>179</sup> See *supra* notes 59–63 and accompanying text.

<sup>180</sup> Editorial, *Reforming Main Street*, WALL ST. J., Jun. 19, 2010, at A14.

Christopher P. Lucia is typical, explaining that the financial crisis occurred in large part because of government overreach when “Fannie Mae and Freddie Mac, . . . government-sponsored enterprises (GSEs)[.] . . . were pressured to make ever-increasing numbers of loans to low-income applicants.” Christopher P. Lucia, Letter to the Editor, *More Bureaucracy Won’t Prevent Future Meltdowns*, WALL ST. J., Feb. 15, 2010, <http://online.wsj.com/article/SB10001424052748703525704575061172808821794.html>.

to . . . future [financial] crises for those of us in the middle class is less government action and more personal responsibility.”<sup>181</sup>

## 2. *Vilify the Regulators*

The second approach aimed at protecting business interests in the wake of a business-implicated set of harms is to bemoan the role of regulators. The claim is that the government is filled with people with their own bad dispositions: ideologues, paternalistic know-it-alls and dangerous tyrants. They do not trust the public to make their own choices and want to limit our freedoms. Thus, in the context of the obesity epidemic, with the threat of health-related lawsuits and new regulations, the Center for Consumer Freedom (a paid third-party messenger for fast food companies, soda manufactures and others) has run ads asking: “Food cops and politicians are attacking food and soda choices they don’t like. Have they gone too far?”<sup>182</sup> As the Center proclaims, “It’s your food. It’s your drink. It’s your freedom.”<sup>183</sup>

Similar arguments have been made by industry advocates, over the last several months, against the proposed consumer financial protection bureau. They follow a general pattern of amplifying the threat posed by the agency, particularly by asserting that the bureau: (1) is a significant danger to our overall system and destabilizes core aspects of what America is all about, (2) presents a major hazard to individuals in the form of potential losses to autonomy, and (3) will end up punishing deserving ingroups and rewarding undeserving outgroups. These arguments are supplemented by attacks that suggest that: (4) regulators may have actually caused the problems that the agency now seeks to remedy, and (5) the particular individuals likely to be appointed to run the agency have bad dispositions, aside from any problems with the agency itself.

Again, by encouraging the public to feel threatened, business interests increase our tendency to trace the causes of recent economic harms to the internal flaws of particular human actors, rather than to the broader situational elements that implicate corporations and that, if addressed by

---

<sup>181</sup> See Cavino, *supra* note 176.

<sup>182</sup> Press Release, Ctr. for Consumer Freedom, Consumer Group Continues Million Dollar Campaign Responding to NYC Health Officials’ Hyperbolic PSA (Oct. 1, 2009), available at [http://consumerfreedom.com/pressRelease\\_detail.cfm/r/283-consumer-group-continues-million-dollar-campaign-responding-to-nyc-health-officials-hyperbolic-psa](http://consumerfreedom.com/pressRelease_detail.cfm/r/283-consumer-group-continues-million-dollar-campaign-responding-to-nyc-health-officials-hyperbolic-psa).

<sup>183</sup> *Declaration of Food Independence*, CTR. FOR CONSUMER FREEDOM, June 30, 2004, [http://www.consumerfreedom.com/article\\_detail.cfm/article/155](http://www.consumerfreedom.com/article_detail.cfm/article/155).

government intervention, would make it more difficult for corporations to control consumer behavior.<sup>184</sup>

a. *A Threat to the System*

One of the most common lines of attack has been to suggest that the regulators seek to bring about major, destabilizing change and thus present a significant danger to everything that we hold dear. As Santelli proclaimed to the Mercantile Exchange crowd, “[I]f you read our founding fathers, people like Benjamin Franklin and Jefferson . . . What we’re doing in this country now is making them roll over in their graves.”<sup>185</sup> By promoting the perception that the new bureau is going to radically alter the American landscape, advocates can tap directly into our tendency to be increasingly dispositionist in our attributions when we feel under threat.<sup>186</sup> One Stop the CFPA television advertisement, for example, warned that the agency “could change the way Americans do business forever.”<sup>187</sup> Dick Morris and Eileen McGann sounded an equally grave siren that the agency was going to result in “liability exposure to shareholders, directors, officers and even employees of covered institutions.”<sup>188</sup>

Jim Harper, of the Cato Institute, has focused on the dangers the bureau holds for the privacy of Americans.<sup>189</sup> He has likened the bureau to a “beetle boring into your personal life” with the ability to “investigate your business conduct and activities” including creating a “Google map of where you and your neighbors do your banking” and handing that information over “to other bureaus, like the Federal Bureau of Investigation.”<sup>190</sup> According to Harper, the end result will be managing the “personal and private affairs” of all citizens.<sup>191</sup> Given the previous discussion concerning the massive collection and analysis of personal data by credit card companies and other financial consumer product providers, and its actual employment in targeted and tailored marketing designed to benefit the

---

<sup>184</sup> See *supra* note 70 and accompanying text.

<sup>185</sup> *Santelli’s Tea Party*, *supra* note 172.

<sup>186</sup> See *supra* note 70 and accompanying text.

<sup>187</sup> *Make it Worse*, STOP THE CFPA, <http://www.stopthecfpa.com> (last visited Aug. 10, 2010).

<sup>188</sup> Dick Morris & Eileen McGann, *The Consumer Frustration and Punishment Agency (CFPA)*, DICKMORRIS.COM, Apr. 26, 2010, <http://www.dickmorris.com/blog/the-consumer-frustration-and-punishment-agency-cfpa/> (internal quotation marks omitted).

<sup>189</sup> Jim Harper, *Planned Economy, Privacy Problems*, CATO @ LIBERTY, Apr. 30, 2010, <http://www.cato-at-liberty.org/planned-economy-privacy-problems> (“If someone asked you what’s wrong with a planned economy, your first answer might not be ‘privacy.’ But it should be.”).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

business often at the expense of the consumer, Harper's sounding of the alarm has an ironic ring to it.<sup>192</sup> But, of course, that story is not being told to the public by the Cato Institute or any other pro-business interests.

b. *A Threat to the Individual: Loss of Autonomy*

The idea that new regulation is going to take away individual autonomy may be the single most significant and effective threat. Milton Friedman often conjured it up in his lectures and writings. As he explained back in 2002, "Underlying most arguments against the free market is a lack of belief in freedom itself."<sup>193</sup> As highlighted earlier, we like to view ourselves as self-transparent, rational actors with control over our environments,<sup>194</sup> and we react strongly when we believe such self-determination is under attack. Unsurprisingly, trade organizations, media outlets and others have made a special push in this realm, warning that the bureau is going to "limit customers' choice of financial products."<sup>195</sup> Ed Yingling, the president and chief executive of the American Bankers Association, has argued that the agency will bar financial services businesses from catering to the particular needs of customers: "Basically, the government is deciding what every bank in every circumstance should offer."<sup>196</sup> As one *Wall Street Journal* editorial noted, "President Obama's financial consumer agency would have the power to . . . dictate how financial products are structured and sold . . . and judge products as 'abusive' or 'unfair,' no matter how many consumers want them . . ."<sup>197</sup> Republican Alabama Senator Richard Shelby has called the idea of a consumer financial protection agency "the nanny state at its worst."<sup>198</sup>

<sup>192</sup> See *supra* notes 79–83 and accompanying text.

<sup>193</sup> MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 15 (Univ. of Chi. Press, 40th Ann. ed. 2002).

<sup>194</sup> See *supra* notes 39–40 and accompanying text.

<sup>195</sup> Audio tape: Stop the CFPA (Sept. 15, 2009), *available at* <http://www.stopthecfpa.com/wp-content/uploads/2009/09/090921WTOP.mp3>. One advertisement paid for by the Chamber of Commerce features a "local baker" and another features a "local butcher;" both warn that "[t]he CFPA would also have the ability to collect information about his [or her] customers' financial accounts and take away many of their financial choices." Advertisement, Stop the CFPA, It's a Tough Economy: The CFPA Will Make it Tougher (Sept. 15, 2009), *available at* [http://www.stopthecfpa.com/wp-content/uploads/2009/09/Cake\\_large.jpg](http://www.stopthecfpa.com/wp-content/uploads/2009/09/Cake_large.jpg); Advertisement, Stop the CFPA, It's a Tough Economy: The CFPA Will Make it Tougher (Sept. 8, 2009), *available at* [http://www.stopthecfpa.com/?page\\_id=122](http://www.stopthecfpa.com/?page_id=122). Butcher: Stop the CFPA.

<sup>196</sup> Michael R. Crittenden & Jane J. Kim, *Consumer Protection on Wide Scale*, WALL ST. J., July 1, 2009, at A2.

<sup>197</sup> *The Big Bank Excuse*, WALL ST. J., Feb. 25, 2010, at A12.

<sup>198</sup> Paletta, *supra* note 19.

According to Richard Posner, the bureau will be “paternalist with a velvet glove”: “Through the use of carrot and stick, the agency will steer consumers to those financial products that it thinks best for them, whatever they naïvely think.”<sup>199</sup> What is interesting is that he overlooks the fact that corporations already use carrots and sticks to steer people to particular financial products, as investigated in this Article.<sup>200</sup>

*c. A Threat to the Group: Punishing the Deserving and Rewarding the Underserving*

Another recurring trope has been to frame the CFPB as huge, all-powerful and biased and then to frame the opposition to the agency as “small,” passive, innocent, disaggregated, and uncalculating—victims of “a massive new regulator” with “sweeping, unchecked powers.”<sup>201</sup> The television advertisements created by the Chamber of Commerce have repeatedly hammered on the theme that the bureau stands for big government crushing small businesses. In one representative ad, titled “Americans Speaking Out,” citizens are shown criticizing the creation of the agency using words and phrases like “another big brother agency,” “big brother,” “another big government agency,” “too much government,” “big,” “large,” “wasteful,” “out of control,” and “overregulating.”<sup>202</sup> Likewise, the Chamber’s Senate Talking Points memo warns that the new consumer protection regulator will enjoy “truly unprecedented power and authority,” “little oversight,” “sweeping overreach,” and few constraints outside of “vague terms and confusing standards.”<sup>203</sup> Numerous *Wall Street Journal*

<sup>199</sup> Posner, *supra* note 177; see also Paletta, *supra* note 19 (“Opponents said the agency was a sign of the ‘nanny state’ that treats regulators as better equipped than citizens to make decisions.”).

<sup>200</sup> See *supra* notes 82–109 and accompanying text.

<sup>201</sup> Advertisement, Stop the CFPA, Get Financial Reform Wrong . . . and Small Business Owners Everywhere Will Face the Consequences, available at [http://www.stopthecfpa.com/?page\\_id=122](http://www.stopthecfpa.com/?page_id=122).

<sup>202</sup> Advertisement, Stop the CFPA, Americans Speaking Out, <http://www.stopthecfpa.com/>; see also Advertisement, Stop the CFPA, The Consumer Financial Protection Agency: If at First You Don’t Succeed, TRY, TRY, TRY, TRY, TRY, TRY, TRY Again, available at [http://www.stopthecfpa.com/wp-content/uploads/2009/11/tryagain\\_lg.jpg](http://www.stopthecfpa.com/wp-content/uploads/2009/11/tryagain_lg.jpg) (“Let’s not confuse making government bigger with making government better.”).

<sup>203</sup> U.S. CHAMBER OF COMMERCE, CENTER FOR CAPITAL MARKET COMPETITIVENESS (Mar. 2010), available at <http://library.uschamber.com/sites/default/files/chambers/files/senatecfptalkingpoints.pdf>. Other trade groups have made identical points. The American Bankers Association, for example, has warned that “[e]nhanced consumer protection should fix what’s broken and not create another layer of federal bureaucracy that consumers will end up paying for.” Joshua Zumbrun, *An Easy First Round for Financial Reforms*, FORBES (Oct. 28,

op-eds, letters and editorials have stuck to a similar theme bemoaning the “new and unprecedented government bureaucracy,” “adding more layers of government with sweeping, ill-defined powers.”<sup>204</sup> As one editorial noted, “[T]he jurisdiction of this regulatory beast will be limited only by the imagination of the Obama Administration. Not only is there no bank in the country too small to be subject to its rules, but any business that charges customers to extend credit could also fall under the new bureaucracy’s ambit.”<sup>205</sup>

Ironically, funded by many very large businesses whose astronomical profits are threatened by the creation of a new consumer financial protection bureau (the consumer financial services industry does \$3 trillion a year in business),<sup>206</sup> the organization Stop the CFPA ran numerous print ads all on the theme that big government (“a new \$410 million big government bureaucracy”) was about to beat up on “small businesses.”<sup>207</sup>

---

2009, 7:45 PM), <http://www.forbes.com/2009/10/28/financial-regulation-congress-business-washington-hearing.html>.

<sup>204</sup> David Hirschmann, *We Want Progress, Not Just Change*, WALL ST. J., Feb. 22, 2010, at A18.

<sup>205</sup> Editorial, *Reforming Main Street*, WALL ST. J., June 18, 2010, at A14; *see also* Editorial, *Son of Sarbox*, WALL ST. J., Apr. 21, 2010, at A20 (“[The bureau] would now be housed inside the Federal Reserve, but that doesn’t mean it would have adult supervision. The Fed board is expressly prohibited from setting the bureau’s budget or controlling its director.”).

<sup>206</sup> *See* Warren, *supra* note 95, at 49. The Chamber of Commerce trumpets that more than ninety-six percent of its members “are small businesses with 100 employees or fewer,” which sounds impressive until one investigates the percentage of total U.S. businesses that employ fewer than 100 employees. *See* U.S. CHAMBER OF COMMERCE, *supra* note 169. In fact, 99.6% of all U.S. businesses fall into this category, which means that the Chamber of Commerce actually has a highly disproportionate number of large businesses as members (approximately ten times higher than in the general population of businesses). *See* U.S. CENSUS BUREAU, STATISTICS ABOUT BUSINESS SIZE (INCLUDING SMALL BUSINESS) tbl.2a (2004), <http://www.census.gov/epcd/www/smallbus.html>. In 2004, there were 25,409,525 firms in the United States, of which 17,047 had 500 or more employees and 86,538 had 100 to 499 employees. *Id.*

<sup>207</sup> *See, e.g.*, Advertisement, Stop the CFPA, I Didn’t Cause the Financial Crisis: Cabinetmaker, available at [http://www.stopthecfpa.com/wp-content/uploads/2009/09/CFPA\\_HIGH\\_RES\\_CABINET\\_MAKER.pdf](http://www.stopthecfpa.com/wp-content/uploads/2009/09/CFPA_HIGH_RES_CABINET_MAKER.pdf); Advertisement, Stop the CFPA, I Didn’t Cause the Financial Crisis: Electrician, [http://www.stopthecfpa.com/wp-content/uploads/2009/09/CFPA\\_HIGH\\_RES\\_electricianREV.pdf](http://www.stopthecfpa.com/wp-content/uploads/2009/09/CFPA_HIGH_RES_electricianREV.pdf); Advertisement, Stop the CFPA, I Didn’t Cause the Financial Crisis: Orthodontist, available at [http://www.stopthecfpa.com/wp-content/uploads/2009/09/CFPA\\_Orthodontist.pdf](http://www.stopthecfpa.com/wp-content/uploads/2009/09/CFPA_Orthodontist.pdf); Advertisement, Stop the CFPA, Think the Economy’s Bad Now?, available at [http://www.stopthecfpa.com/wp-content/uploads/2009/12/US\\_Chamber\\_CFPA\\_05.pdf](http://www.stopthecfpa.com/wp-content/uploads/2009/12/US_Chamber_CFPA_05.pdf) (“Eight in ten new jobs are created by small businesses, but the CFPA Act would cut access to credit for millions of small businesses, making it harder for

That is, innocent parties who “had nothing to do with the financial crisis” were going to be held accountable for it.<sup>208</sup> The ads featured an orthodontist, a cabinetmaker and an electrician each repeating the mantra, “I didn’t cause the financial crisis. So why will the CFPA punish my practice/business?”<sup>209</sup> Radio ads run in Montana and other states emphasized the same idea that innocents would be “punished.”<sup>210</sup>

According to the *Wall Street Journal*, the end result is that “[t]he new consumer bureau will be ground zero in the political allocation of credit” as “the bureau and its new boss will make subjective judgments about which financial products are ‘abusive’ or ‘unfair.’”<sup>211</sup> As a political tool, undeserving groups—the malingering, irresponsible debtors favored by the Obama administration—will be given handouts, while deserving groups are raked over the coals. In making the point, the *Journal* has not pulled punches in linking the new agency to clear outgroups, like lawyers and activist organizations: as a recent editorial warned, “The bureau would have broad power to set the terms of financial products and services, labeling as abusive whatever officials (or outside allies like Acorn) dislike, and paving the way for large new litigation costs.”<sup>212</sup> Whether conscious or not, the *Journal’s* rhetoric, portraying disliked outgroups as profiting at the expense of ingroup members, has been well-documented as an effective means to encourage dispositionism in a population. And, in this case, it has provided an effective means of diverting attention away from the role of

---

growing companies to expand operations and hire new employees.”); Advertisement, Stop the CFPA, Think the Economy’s Bad Now? (Hard Hat), available at [http://www.stopthecfpa.com/wp-content/uploads/2009/12/US\\_Chamber\\_CFPA\\_03.pdf](http://www.stopthecfpa.com/wp-content/uploads/2009/12/US_Chamber_CFPA_03.pdf).

<sup>208</sup> Advertisement, I Didn’t Cause the Financial Crisis: Orthodontist, *supra* note 207.

<sup>209</sup> See, e.g., *id.*; Advertisement, I Didn’t Cause the Financial Crisis: Cabinetmaker, *supra* note 207; Advertisement, I Didn’t Cause the Financial Crisis: Electrician, *supra* note 207.

<sup>210</sup> Audio tape: Stop the CFPA, *supra* note 195 (“[The CFPA] . . . will make it harder for business and consumers to access credit, limit consumers choice of financial products, and authorize new taxes on everything from mortgages to ATM transactions.”); see also Advertisement, Stop the CFPA, I Didn’t Cause the Financial Crisis: So Why Will the CFPA Punish My Business?, available at [http://www.stopthecfpa.com/wp-content/uploads/2009/09/1002\\_cfpa\\_glasses.pdf](http://www.stopthecfpa.com/wp-content/uploads/2009/09/1002_cfpa_glasses.pdf) (“The CFPA will create a new complicated maze of government bureaucracy with broad powers that will extend far beyond banks, imposing vast and conflicting regulations on dozens of types of ordinary businesses that had nothing to do with the financial crisis.”).

<sup>211</sup> Editorial, *A Tale of Two Regulators*, WALL ST. J., July 22, 2010, at A18; see also *Son of Sarbox*, *supra* note 205 (“The entire point of the bureau is to put politicians in charge of allocating credit.”).

<sup>212</sup> *Id.*



business in creating the conditions that lead to countless bankruptcies, foreclosures and lost jobs.

d. *The Cause of the Problem in the First Place*

The assertion is not only that government bureaucrats overreact to perceived harms causing greater problems and dangerously restricting free choice, but also that regulators may be the source of the harms in the first place.

According to this line of argument, the reason that credit card agreements are so long and incomprehensible does not have anything to do with hiding the ball from consumers so as to guide individuals into the most favorable arrangements for business, as has been suggested in this Article.<sup>213</sup> The reason has to do with the fact that “[o]ver the years, federal laws governing disclosures have become encrusted with an ever-thickening coat of litigation—and regulation—imposed barnacles.”<sup>214</sup> Hence, it is “[r]egulatory mandates and lawsuit fears [that] are largely responsible for the mind-numbing length of a typical credit-card agreement and monthly statement.”<sup>215</sup> Indeed, from this perspective, there is something downright “Orwellian” about the creation of the bureau and the idea “that we need thousands of pages of incomprehensible legalese in the form of a ‘Restoring American Financial Stability Act’ in order to protect Americans from incomprehensible legalese.”<sup>216</sup>

Furthermore, as discussed previously, according to the dispositionist model, since consumers are rational actors exercising free choice, they should be held accountable for their decisions and the government should not intervene to help them out.<sup>217</sup> It is the paternalistic government that, in Rick Santelli’s words, is “promoting bad behavior.”<sup>218</sup> Any type of government intervention that brings down the foreclosure rate (by say, offering subsidies to lenders who reduce payments) is just going to encourage more reckless behavior in the future. As one trader on the floor of the Chicago Mercantile Exchange yelled out as Santelli gave his speech, “How ‘bout we all stop paying our mortgage? It’s a moral hazard.”<sup>219</sup> If

---

<sup>213</sup> See *supra* notes 95–98 and accompanying text.

<sup>214</sup> Todd Zywicki, *Complex Loans Didn’t Cause the Financial Crisis*, WALL ST. J., Feb. 19, 2010, at A15.

<sup>215</sup> *Id.*

<sup>216</sup> Thomas Hofler, *More Bureaucracy Won’t Prevent Future Meltdowns*, WALL ST. J., Feb. 16, 2010, at A18.

<sup>217</sup> See *supra* Part III.B.

<sup>218</sup> Santelli’s *Tea Party*, *supra* note 172.

<sup>219</sup> *Id.*

people were free to feel the consequences of their poor choices, it follows that there would not be any more economic meltdowns in the future.<sup>220</sup>

e. *The Bad Dispositions of Individual Regulators*

A final means of vilifying regulators has been to go after the director of the bureau. As the Chamber of Commerce forewarned, "The Director would be able to unilaterally make decisions that cannot be overruled by the President, let alone safety and soundness regulators."<sup>221</sup> In casting the role as one of a dangerous autocrat, those attempting to derail or constrain the agency have focused their attentions on the person long understood to be the frontrunner for the new position, Elizabeth Warren.<sup>222</sup> Even after her appointment as Assistant to the President and Special Advisor to the Secretary of the Treasury in charge of overseeing the establishment of the new agency,<sup>223</sup> the goal has been to cast Warren as out-of-touch, extreme, ideological and self-aggrandizing. Tennessee Republican Senator Bob Corker, for example, has called Warren "an activist" and suggested that her appointment would be "a very dangerous, worst case scenario."<sup>224</sup> In a thinly-veiled swipe at Warren, Phillip Swagel, writing in the *Wall Street Journal*, referred to "a media-obsessed head of a new consumer financial protection agency looking to impose her will across all aspects of commerce, with attendant hits to lending for consumers and businesses, small and large."<sup>225</sup> Banking groups and other business interests have offered similarly dire forecasts. Anton Schutz, president of Mendon Capital Advisors, explained his distrust of Warren this way: "I get disgusted every time I hear her speak. It's like she's sitting in some ivory tower, not understanding the ramifications of anything she says. Any person you put in that role really ought to have some industry experience."<sup>226</sup> Alan Kaplinsky, a lawyer who advises the financial industry at Ballard Spahr, offered a comparable assessment, "I don't think she can run that new

---

<sup>220</sup> And, in fact, according to the dispositionist worldview, this is also the story of our past. As Milton Friedman describes, "The Great Depression, like most other periods of severe unemployment, was produced by government mismanagement rather than by any inherent instability of the private economy." FRIEDMAN, *supra* note 193, at 38.

<sup>221</sup> U.S. CHAMBER OF COMMERCE, *supra* note 203.

<sup>222</sup> See Paletta, *supra* note 19.

<sup>223</sup> Jackie Calmes & Sewell Chan, *Obama Picks Warren to Set Up Consumer Bureau*, N.Y. TIMES, Sept. 18, 2010, at B5.

<sup>224</sup> Damian Paletta, *Consumer Post Prospect Has Democrats in Knots*, WALL ST. J., July 20, 2010, at A5.

<sup>225</sup> Phillip Swagel, *Ironing Out the Kinks in the Dodd Bill*, WALL ST. J., Apr. 30, 2010, at A17.

<sup>226</sup> Maria Aspan & Kim Dixon, *Analysis: Wall Street Loathing for Warren Lifts Regulator Bid*, REUTERS, July 27, 2010, <http://www.reuters.com/article/idUSTRE66Q07P20100727>.

agency in a fair, balanced way where she can listen to all the constituencies, not just the consumer advocates.”<sup>227</sup>

Although more subtle in his criticism, Richard Posner has been just as dispositionist in his characterizations of those behind the new bureau by portraying them as know-it-all academics: the kind of people who are always pointing out faults in other people while failing to see their own major shortcomings. As he asks, “Behavioral economists are right to point to the limitations of human cognition. But if they have the same cognitive limitations as consumers, should they be designing systems of consumer protection?”<sup>228</sup>

### 3. *Offer Dispositionist Solutions*

In the wake of the financial meltdown of 2008, it is somewhat surprising to still hear claims that the free market corrects itself. However, that assertion has a proven pedigree and aligns so well with a dispositionist outlook, which traces bad outcomes to individual, controllable bad choices rather than impersonal and often-complex situational factors, that it is still an effective way for corporations to address harms in which they are implicated.<sup>229</sup>

When Elizabeth Warren wrote an op-ed in the *Wall Street Journal* assailing the fact that “the same Wall Street CEOs who brought the economy to its knees have spent more than a year and hundreds of millions of dollars furiously lobbying Washington to kill the president’s proposal for a Consumer Financial Protection Agency,”<sup>230</sup> both the newspaper and its readers responded with strong skepticism grounded in a belief that markets resolve their own problems. As the *Journal* announced, “[T]he CEOs who sailed their companies into the rocks have long since been fired. Unlike in politics, failure is punished in business.”<sup>231</sup> This, of course, fits back into

---

<sup>227</sup> *Id.*

<sup>228</sup> Posner, *supra* note 177.

<sup>229</sup> Benforado et al., *supra* note 61, at 1782.

Individuals are presumed to know what is best for them and to act in their own interests. The individual consumer is the only one in a position to assess hidden preferences, except inasmuch as they are revealed by actions. Any attempt to make people “better off” through nonvolitional means is certain to fail because regulators simply do not have access to the preferences of individuals.

*Id.*

<sup>230</sup> *The Big Bank Excuse*, *supra* note 197.

<sup>231</sup> *Id.* Thomas Hofler had an almost identical comment printed in a letter to the *Journal*: “To which CEOs is [Warren] referring? Perhaps Stan O’Neal, James Cayne, Charles Prince or Richard Fuld? No, none of these folks have lobbied

responding to harms by vilifying regulators.<sup>232</sup> In Milton Friedman's estimation, "[T]he government solution to a problem is usually as bad as the problem and very often makes the problem worse."<sup>233</sup> This counsels inaction. For Richard Posner, the CFPB is likely to have an epitaph of "too much, too soon, too costly"<sup>234</sup>—an argument repeated in many editorials and op-eds asserting that the unregulated status quo works pretty well and that rather than rush into something, we need to "go back to the drawing board."<sup>235</sup>

When free market solutions are strongly belied by salient recent experience such that they cannot be easily and reasonably avowed, information-based approaches are a good second best. In opposing the proposed CFPA and its eventual embodiment, the CFPB, for example, the Chamber of Commerce has argued that the "right way" to accomplish reform "is to ensure clearer disclosure and better information for consumers."<sup>236</sup> This mirrors proposals asserted in the context of the obesity epidemic and the regulation of dietary supplements, which, with heavy backing from industry, have also relied to a significant extent on dispositionist solutions based on the idea that well-informed consumers will naturally make wise choices.<sup>237</sup> As Todd Buchholz wrote in a report for the Chamber of Commerce back in 2003 as fast food companies began to circle the wagons out of fear of regulation and litigation concerning the health impacts of their products, "Clearly the best avenue is for [fast food] firms to provide choices and provide information so that customers can be informed, prudent and as up-to-date as they like."<sup>238</sup> The attraction of such proposals for business is that it maintains the location of the problem squarely inside the consumer—people are ill-informed—and does not address (or

---

anyone for at least eighteen months because, unlike Washington, Wall Street holds its leaders accountable." Hofler, *supra* note 216.

<sup>232</sup> See *supra* Part IV.B.2.

<sup>233</sup> MILTON FRIEDMAN, AN ECONOMIST'S PROTEST 6 (2nd ed. 1975).

<sup>234</sup> Posner, *supra* note 177.

<sup>235</sup> Thomas J. Donohue, *CFPA Would Limit Credit and Prevent Consumer Revival of the Economy*, MCCLATCHY-TRIB., Jan. 29, 2010, available at <http://www.uschambersmallbusinessnation.com/article/cfpa-would-limit-credit-and-prevent-consumer-revival-of-the-economy> ("Consumers and lawmakers would be wise to follow the physician's rule when deciding how to 'fix' consumer protection laws—first, do no harm.").

<sup>236</sup> U.S. CHAMBER OF COMMERCE, *supra* note 203; see also Advertisement, *Americans Speaking Out*, *supra* note 202 ("Consumers need clearer disclosure and better information.").

<sup>237</sup> See Benforado et al., *supra* note 61, at 1782–91.

<sup>238</sup> TODD G. BUCHHOLZ, *BURGERS, FRIES AND LAWYERS: THE BEEF BEHIND OBESITY LAWSUITS 20* (U.S. Chamber of Commerce, 2003), available at [www.instituteforlegalreform.com/get\\_ilr\\_doc.php?docId=1208](http://www.instituteforlegalreform.com/get_ilr_doc.php?docId=1208).

acknowledge) the numerous situational manipulations that corporations employ to sway even intelligent, well-informed customers.

Another approach, somewhat of a fallback, is to offer support for going after the bad apples within the corporate world itself. We need to root them out and treat them harshly. Jeff Skilling, the former CEO of Enron, was a rotten egg. Dick Fuld, the former CEO of Lehman, is a scoundrel. WorldCom and Adelphia Communications deserved to crumble and fall.

By focusing on the bad dispositions of a few “evil” characters, corporate entities can concentrate and deflect popular anger. Just as important, with a few scapegoats gaining all of the attention of regulators and prosecutors, the business world can avoid broader systemic changes. Once the problem is behind bars or dissolved, corporate actors can keep doing the same things that were so profitable to begin with. While the disclosure of Bernie Madoff’s \$50 billion Ponzi scheme was cast in the popular press as devastating for Wall Street firms and other big business,<sup>239</sup> in some ways it came as a great benefit. What Madoff did was so clearly and saliently bad that it helped to draw the attention away from all of the hidden tricks and deceptions that hurt consumers—to the profit of corporate entities—on a much broader scale.

In the context of fighting the proposed consumer financial protection agency, the Chamber of Commerce has also supported the need for “vigorous enforcement of predatory practices and other consumer frauds.”<sup>240</sup> It seems counterintuitive, until one realizes that most of the manipulations that mortgage and credit card companies engage in—outlined in Part I.A—do not clearly rise to the level of fraudulent behavior. Again, it is not as if the universal default provisions do not appear in the contracts; they do. It is just that credit card companies know that the average consumer is not going to pay any heed to the fine print.

#### 4. *Depersonify the Corporation*

A fourth approach for ensuring that the public makes favorable attributions that do not implicate corporate interests is to cast the business as merely an edifice. The personified corporation is more at risk of being

<sup>239</sup> See Robert Lenzner, *Bernie Madoff’s \$50 Billion Ponzi Scheme*, FORBES, Dec. 12, 2008, [http://www.forbes.com/2008/12/12/madoff-ponzi-hedge-pf-ii-in\\_rl\\_1212croesus\\_inl.html](http://www.forbes.com/2008/12/12/madoff-ponzi-hedge-pf-ii-in_rl_1212croesus_inl.html).

<sup>240</sup> *Financial Regulation and Consumer Protection*, STOP THE CFPA, <http://www.stopthecfpa.com/>; see also U.S. CHAMBER OF COMMERCE, *supra* note 203 (arguing for “effective enforcement against predatory practices through increased focus on these activities”). This, again, has a parallel to regulatory approaches addressing the food and drug industry. See Benforado et al., *supra* note 61, at 1787–88.

seen as an active causal agent, so there is a clear advantage to emphasizing that it is, in fact, a non-human entity, a collection of contracts, a legal fiction.

The challenge is that corporations expend significant resources to be understood as possessing human traits. Indeed, since the nineteenth century, American corporations have fought to be treated as persons under the law.<sup>241</sup> In fact, today, corporate entities can “own property, make contracts, commit torts, and . . . sue and be sued,” among other things.<sup>242</sup> Through a tireless campaign of litigation, corporations have won important constitutional rights enjoyed by flesh-and-blood Americans under the First Amendment,<sup>243</sup> Fourth Amendment,<sup>244</sup> Fifth Amendment,<sup>245</sup> and Fourteenth Amendment.<sup>246</sup> The jurisprudence is now firmly grounded: as the Supreme Court explained in *Metropolitan Life Insurance Company v. Ward*, “[i]t is well established that a corporation is a ‘person’ within the meaning of the Fourteenth Amendment.”<sup>247</sup> And the march towards full personhood continues. In the recent case of *Citizens United v. Federal Election Commission*, the Supreme Court offered a striking affirmation of corporations’ First Amendment free speech rights, overturning long-existing doctrine permitting the government to ban political spending by corporate entities in candidate elections.<sup>248</sup>

Outside of the legal sphere, many marketing and advertising campaigns are designed to ingrain the idea that corporations are not abstractions or buildings, but people—characters with personality and individual identity. Apple is the “Mac guy”—a hip, likeable, good-looking, casually-dressed 20-something (to be contrasted with the “PC guy”—a nerdy, bespeckled, bumbling, overweight man in a suit and tie).<sup>249</sup> Dos Equis, the Mexican beer, is “The Most Interesting Man in the World”—a handsome, suave, silver-haired man’s man, “an amalgamation of Hemingway, 007 and

---

<sup>241</sup> See, e.g., Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793 (1996).

<sup>242</sup> Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1482–83 (2009).

<sup>243</sup> See, e.g., *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784–85 (1978).

<sup>244</sup> See, e.g., *Hale v. Henkel*, 201 U.S. 43, 75–76 (1906), *overruled in part on other grounds by* *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52, 84 (1964).

<sup>245</sup> See, e.g., *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253 (1937).

<sup>246</sup> See, e.g., *Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886).

<sup>247</sup> *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985).

<sup>248</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 50 (2010).

<sup>249</sup> See Seth Stevenson, *Mac Attack: Apple’s Mean-Spirited New Ad Campaign*, SLATE, June 19, 2006, <http://www.slate.com/id/2143810/>.

Salvador Dali, with a touch of Chuck Norris.”<sup>250</sup> As embodied by the actor Jonathan Goldsmith, he is “superbly confident, obviously successful and clearly a role model. He’s not trying to impress anyone; he doesn’t need to.”<sup>251</sup> The ads have been incredibly successful. In 2009, with imported beer sales down four percent in the United States, Dos Equis saw its sales increase by over twenty percent.<sup>252</sup>

Corporations want to be your friends, your idols, your trusted mentors. They want you to feel emotionally connected to them. You can follow personified corporations on the social messaging service Twitter.<sup>253</sup> You can become Facebook friends with them. The Dos Equis Facebook page, for example, has a picture of “The Most Interesting Man in the World,” just like a real human’s page, and information about the company is written from his perspective.<sup>254</sup> The Dos Equis personification has over 756,037 Facebook “fans” who constantly post quotations that they imagine he might say.<sup>255</sup> The campaign is part of a long history of using invented human characters—from Aunt Jemima to Ann Taylor—to get consumers to see corporations as people in order to further control our situations to maximize profits. Betty Crocker—once rated the second most famous American woman after Eleanor Roosevelt—is a pure corporate creation: the name Betty was chosen because it seemed “warm and friendly.”<sup>256</sup> Ms. Crocker later acquired a signature, a voice (provided by various actresses), and, starting in 1936, a face to reinforce the belief that she was real.<sup>257</sup> Over time, her image was altered to better appeal to consumers: “she became younger in 1955; she became a ‘professional’ woman in 1980; and in 1996 she became multicultural, acquiring a slightly darker and more ‘ethnic’ look.”<sup>258</sup>

---

<sup>250</sup> Gunnar Helliesen, *The Most Interesting Ad in the World*, SEATTLE POST-INTELLIGENCER, Apr. 7, 2010, [http://www.seattlepi.com/business/418157\\_tvads07.html](http://www.seattlepi.com/business/418157_tvads07.html); see also DOS EQUIS, <http://dosequis.com> (last visited Nov. 12, 2010).

<sup>251</sup> Helliesen, *supra* note 250.

<sup>252</sup> Kate Lunau, *King of Beer Sales, Amigo: The Ad Campaign That's Made Dos Equis a Household name*, MACLEANS.CA, Aug. 13, 2009, <http://www2.macleans.ca/2009/08/13/king-of-beer-sales-amigo/> (quoting Dan Wandel).

<sup>253</sup> Brian Stelter, *Gripping Online? Cable Company Hears You and Talks Right Back*, N.Y. TIMES, July 25, 2008, at A16 (discussing various corporate efforts to reach out personally to consumers online, including through Twitter).

<sup>254</sup> Dos Equis FACEBOOK, <http://www.facebook.com/DosEquis> (last visited Sept. 15, 2010).

<sup>255</sup> *Id.*

<sup>256</sup> *Who Was Betty Crocker?*, CENTER FOR HISTORY AND NEW MEDIA, <http://chnm.gmu.edu/sidelights/who-was-betty-crocker/> (last visited Oct. 26, 2010).

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

Of course, an equally successful strategy is to hire celebrity spokespeople, who come to embody the corporation. Nike is not an office complex in Beaverton, Oregon or “an artificial being, invisible, intangible and existing only in contemplation of law;”<sup>259</sup> it is Michael Jordan; it is Derek Jeter; it is Tiger Woods. It speaks to us, inspires us and challenges us—just like a real person.

However, when something bad happens, all that humanness goes away, and we are left standing next to an empty cardboard cutout or a cold glass and steel building. From the perspective of business, the goal is to have all of the rights of a person but none of the responsibilities. And luckily for corporations, our dispositionist tendency is ready to help the process along. Bad things happen when bad people exercise their will to take bad actions, but corporations do not have such a capacity. As William Blackstone wrote, “Punishments are . . . only inflicted for the abuse of that free will, which God has given to man . . . .”<sup>260</sup> Thus, “[a] corporation cannot commit treason, or felon[ies], or other crime[s].”<sup>261</sup>

More recent commentators have offered analogous arguments against holding a corporation criminally responsible for wrongdoing. John S. Baker, Jr. has argued that corporations “should not be the subjects of criminal prosecution” because they “are abstract, impersonal, utilitarian entities lacking emotions and a personal story . . . .”<sup>262</sup> Albert Alschuler has asserted that only “silly,” “superstitious people” would see a corporation as an entity capable of committing a moral wrong and potentially worthy of punishment.<sup>263</sup> He likens the idea of attributing blame to a corporation to the absurdity of punishing a computer for misbehaving,<sup>264</sup> or holding “a dagger, a fountain pen, a Chevrolet, or any other instrumentality of crime”

---

<sup>259</sup> Tr. of *Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819) (offering such a description of a “corporation”).

<sup>260</sup> 2 WILLIAM BLACKSTONE, *Book IV. – Of Public Wrongs*, in COMMENTARIES ON THE LAWS OF ENGLAND \*1, \*27. This aligns with the characterization of eighteenth century English Lord Chancellor Baron Edward Thurlow that a corporation has “no soul to be damned, and no body to be kicked.” John C. Coffee, “*No Soul to Damn, No Body to Kick*”: *An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 386 (1981) (quoting Thurlow).

<sup>261</sup> 1 WILLIAM BLACKSTONE, *Book II. – Of the Rights of Things*, in COMMENTARIES ON THE LAWS OF ENGLAND \*1, \*476. According to Albert Alschuler, Blackstone “regarded the point as so obvious that it needed no elaboration.” Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1363 (2009).

<sup>262</sup> John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 350 (2004).

<sup>263</sup> Alschuler, *supra* note 261, at 1372, 1377–78.

<sup>264</sup> *Id.* at 1373 (“Expressing one’s values by smashing a computer can be therapeutic, but it is not recommended for children or for grownups.”).



morally responsible.<sup>265</sup> John Hasnas has put it succinctly: “there is *no* theoretical justification for corporate criminal liability.”<sup>266</sup> Milton Friedman has made similar comments concerning the idea that corporations ought to have a moral conscience and be tasked with doing good: “Can a building have moral opinions? Can a building have social responsibility? If a building can’t have social responsibility what does it mean to say that a corporation can? A corporation is simply an artificial legal structure . . . . It’s neither moral nor immoral.”<sup>267</sup>

Friedman explains that “to say that a corporation has no moral position does not mean that the people who run that corporation” have no moral responsibility.<sup>268</sup> Indeed, he argues that “[t]he corporation is amoral but the people who run the corporation are not amoral.”<sup>269</sup> Hence, in alignment with our tendency to ignore the influence of elements in our situations in favor of attributions that trace causes to personalities, anything and everything that a corporation does can be traced back to the dispositions of the people running the corporation—in Manuel Velasquez’s words, “[t]he interior desires and beliefs of the individuals in the organization.”<sup>270</sup> Thus, it is absurd to construct “some kind of ghostly organizational spirit that is present in the organization and that somehow exerts external pressures and forces on its members.”<sup>271</sup>

Overall, if the corporation were a person, our dispositionism might drive us to blame it, but by depersonifying the corporation, this route is closed off. Moreover, Friedman’s suggestion that there are people within the corporate entity who have the potential to be blamed assuages our fear that every harm that occurs must be the consumer’s fault, without actually amounting to much of a threat to any corporate actors. This is, in part, because the corporation acts as a veil, making most individuals within the

---

<sup>265</sup> *Id.* at 1392.

<sup>266</sup> John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329, 1329 (2009) (emphasis in original); see also Timothy Lynch, *Introduction: First Principles of American Criminal Justice*, in IN THE NAME OF JUSTICE xvii (Timothy Lynch ed., Cato Institute 2009) (“Policymakers should excise the doctrine of corporate criminal liability from American law.”).

<sup>267</sup> THE CORPORATION (Big Picture Media 2004) (interview with Milton Friedman); see also Friedman, *supra* note 112 (“What does it mean to say that ‘business’ has responsibilities? Only people can have responsibilities. A corporation is an artificial person and in this sense may have artificial responsibilities, but ‘business’ as a whole cannot be said to have responsibilities, even in this vague sense.”).

<sup>268</sup> THE CORPORATION, *supra* note 267.

<sup>269</sup> *Id.*

<sup>270</sup> Manuel Velasquez, *Debunking Corporate Moral Responsibility*, 13 BUS. ETHICS Q. 531, 544 (2003).

<sup>271</sup> *Id.*

corporation seem much less saliently involved in the harms than they otherwise would appear—we buy our gas from Exxon, not Bill Jones; we order our Heritage shawl collar cardigans from Banana Republic, not Diane Simpson.

### 5. *Situationalize Business Decisions*

The final approach to protect businesses from the fallout after negative outcomes is actually a flip in which the dispositionist narrative is forgone in favor of stories about the power of situation. It only really occurs when corporate actors are making sense of their own actions. Just as social psychology experiments predict, in that scenario, individuals offer behavioral attributions that focus on structural constraints, existing procedures, established norms and other forces.

One situationist narrative, often repeated in recent months, is that the events that led to the economic collapse were not something that anyone could have foreseen. As Goldman Sachs CEO Lloyd Blankfein explained to the Financial Crisis Inquiry Commission,

As I look back prior to the beginning and throughout the course of the crisis, we never knew at any moment if asset prices would deteriorate further, or had declined too much and would snap back . . . . After the fact, it is easy to be convinced that the signs were visible and compelling. In hindsight, events not only look predictable, but look like they were obvious or known. But none of us know what is going to happen.<sup>272</sup>

Later in his testimony, Blankfein analogized investment banks' risk assessment decision-making to that conducted by insurers considering hurricanes, noting that "[e]verything is context-driven."<sup>273</sup>

Another situationist narrative that emerged in recent months was to put the financial crisis in broader perspective and argue that the recent downturn was just a natural part of the economic cycle (i.e., markets go up and markets go down). As Jamie Dimon, the CEO of JP Morgan, recounted in his testimony before the Commission, "My daughter called me from school one day and said 'Dad what's a financial crisis' and without trying

---

<sup>272</sup> *First Public Hearing of the FCIC, Day One: Hearing Before the FDIC Fin. Crisis Inquiry Comm'n*, Jan. 13, 2010 (testimony of Lloyd C. Blankfein, Chairman and CEO, The Goldman Sachs Group, Inc.).

<sup>273</sup> Dylan Ratigan, Editorial, *Here Comes the Story of the "Hurricane,"* MSNBC, <http://www.msnbc.msn.com/id/34864663/> (last visited Oct. 26, 2010) (quoting Blankfein's testimony).

to be funny, I said, 'It's the kind of thing that happens every 5–7 years.' And she said, 'Then, why is everybody so surprised?'"<sup>274</sup>

A final narrative is that everyone in the business was doing the exact same thing—no one was trying to scam anyone or do anything underhanded, it was just herd behavior as bankers went about their work using the same assumptions, which ultimately turned out to be flawed.<sup>275</sup> The argument is essentially: you put anyone in that pressure cooker and you will get the same behavior.

On the whole, this approach is particularly critical with respect to laying the groundwork for a government bailout. If the public sees the majority of Wall Street actors as evil, greedy and blameworthy, expending public money to prop up critical financial institutions becomes increasingly untenable.

Once again, our attributions of causation and responsibility are crucial in determining how the government interacts with business.

## V. CONCLUSION

For many of the corporate actors implicated in the recent global financial crisis, there may actually be a good deal of truth in this last situationalizing narrative. We ought to take it seriously, but we also ought to be situationally sensitive for everyone involved in the still-unfolding drama—including American consumers and government regulators—and we must understand that our gut instincts with respect to our attributions are often inaccurate. We need to stop focusing on bad apples and start thinking about our rotten trees and our poisoned orchards.

There are certainly some people who are intent on only looking out for themselves, who have no qualms about hurting others, or who are driven purely by greed or animus. But those folks are rare. We must resist the urge to go out and round up the individuals on TIME magazine's list of "25 People to Blame for the Financial Crisis" and think that we have dealt with the problem.<sup>276</sup>

---

<sup>274</sup> Shahien Nasiripour, *Financial Crisis Commission Testimony*, HUFFINGTON POST, Jan. 13, 2010, [http://www.huffingtonpost.com/2010/01/13/financial-crisis-commissi\\_n\\_421461.html](http://www.huffingtonpost.com/2010/01/13/financial-crisis-commissi_n_421461.html) (quoting Dimon's testimony).

<sup>275</sup> See David Segal, *Financial Fraud Rises as Target for Prosecutors*, N.Y. TIMES, Mar. 12, 2009, at 1.

<sup>276</sup> *25 People to Blame for the Financial Crisis*, TIME, [http://www.time.com/time/specials/packages/article/0,28804,1877351\\_1877350\\_1877339,00.html](http://www.time.com/time/specials/packages/article/0,28804,1877351_1877350_1877339,00.html) (last visited Nov. 1, 2010).

Indeed, our obsession with making such lists—and ranking the villains<sup>277</sup>—is exactly what sets us off course.

If we focus on a simple story of a few greedy people or a few immoral actors, and put our resources into public congressional hearings to shame them or criminal actions to punish them, we may feel better temporarily, but we will not be ensuring that the bad outcomes do not occur again. If we buy into the notion that those losing their homes or buried in debt got where they are because of their bad dispositions, we are bound to see the immense suffering of the last two years reemerge over and over down the line.

Business is implicated in a lot of harms in society and new government approaches could help resolve many of these problems, but we must be willing to take off our dispositionist blinders and look further afield as we search for solutions.

This Article began with a quotation from Milton Friedman and it ends with one as well. In 1980, just at the dawn of Ronald Reagan's deregulatory revolution, Friedman proclaimed, "There is no place for government to prohibit consumers from buying products the effect of which will be to harm themselves."<sup>278</sup> As this Article has suggested, such rhetoric has an inherent appeal for many Americans: we generally operate with the understanding that people are rational, autonomous actors who make free choices and, as a result, should be held to their decisions whether the outcome is good or bad. But Friedman is wrong. And he is wrong, not because he feared ceding control over the direction of his life to some external entity—a worry that most all Americans share—but because he failed to give serious attention to the immense control that we already cede to business in the absence of government.

---

<sup>277</sup> On its website, TIME magazine asks readers to vote on the "relative guilt (or innocence) of each person" on the "blameworthy" list. *25 People to Blame for Financial Crisis*, TIME, [http://www.time.com/time/specials/packages/article/0,28804,1877351\\_1878509\\_1878508,00.html](http://www.time.com/time/specials/packages/article/0,28804,1877351_1878509_1878508,00.html) (last visited Oct. 26, 2010).

<sup>278</sup> *Milton Friedman, Free to Choose*, vol. 7 (PBS television broadcast 1980), available at [http://video.google.com/videoplay?docid=3535456672\\_331412636#](http://video.google.com/videoplay?docid=3535456672_331412636#).